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No. ——

IN THE

Supreme Court of the United States

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

KATHRYN A. BELFANCE, Trustee,
the Copperweld Steel Company Liquidation Trust,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES J. KEIGHTLEY *
General Counsel
WILLIAM G. BEYER
Deputy General Counsel
ISRAEL GOLDOWITZ
SUSAN E. BIRENBAUM
Assistant General Counsels
KENNETH J. COOPER
NATHANIEL RAYLE
GARTH D. WILSON
Attorneys
PENSION BENEFIT GUARANTY CORPORATION
1200 K Street, N.W.
Washington, D.C. 20005
(202) 326-4020

Of Counsel:
CHARLES G. COLE
STEPTOE & JOHNSON, L.L.P.
1330 Connecticut Ave., N.W.
Washington, D.C. 20036-1795
(202) 429-3000

* Counsel of Record

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QUESTION PRESENTED

Whether a federal agency's bankruptcy claim must be determined in accordance with the federal statute and implementing regulation that establish the liability.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Pension Benefit Guaranty Corporation ("PBGC" or the "Agency"), an agency of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.[1]

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (Pet. App. 20a) is reported at 232 F.3d 505. The order denying the petition for rehearing (Pet. App. 29a) is unreported. The district court's

[1] PBGC "has the power . . . to sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State or Federal." 29 U.S.C. § 1302(b)(1). The Solicitor General has authorized the filing of this petition to the extent such authorization is required.

opinion (Pet. App. 12a) is unreported. The bankruptcy court's opinion (Pet. App. 1a) is unreported, but can be found at 1997 Bankr. LEXIS 2155. The bankruptcy court's judgment is unreported. (Pet. App. 10a.)

JURISDICTION

The court of appeals entered judgment on November 17, 2000. It denied PBGC's petition for rehearing on January 30, 2001. On April 23, 2001, Justice Stevens extended the time within which to file a petition for writ of certiorari to and including May 30, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves the following statutory provisions:

Employee Retirement Income Security Act of 1974, as amended ("ERISA"): 29 U.S.C. §§ 1301, 1362 (1994) (Pet. App. 31a, 38a);[2] and

Bankruptcy Code: 11 U.S.C. §§ 502, 1123 (1988 & Supp. V 1993) (Pet. App. 43a, 48a).[3]

The case involves the following regulation:

29 C.F.R. pt. 2619 (1995) (copies lodged).[4]

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[2] Because the pension plans involved in this case terminated in 1995, citations to ERISA are to the 1994 edition of the United States Code, except where otherwise noted.

[3] The debtors in this case filed their bankruptcy petitions in 1993. Therefore, citations to the Bankruptcy Code are to the 1988 edition of the United States Code.

[4] Except as otherwise noted, citations to the Code of Federal Regulations are to the July 1, 1995 edition. In 1996, PBGC renumbered all of its regulations without substantive change. 61 Fed. Reg. 34,001 (1996) (codified at 29 C.F.R. § 4000.1, .2 (1996)).

STATEMENT OF THE CASE

PBGC is the federal agency that administers the nation's pension plan termination insurance system. When an underfunded pension plan terminates, PBGC typically takes over the plan and pays guaranteed benefits to the plan's participants. The employer, in turn, becomes liable to PBGC for the shortfall between the plan's assets and liabilities. ERISA specifically directs that this termination liability is to be determined in accordance with assumptions prescribed by PBGC. Twenty years ago, PBGC prescribed such assumptions in a regulation that governs all pension plan terminations. The bankruptcy court in this case, however, declined to follow the regulation on the ground that it gave PBGC an unfair advantage vis-à-vis other creditors. Instead, the bankruptcy court disallowed 96% of PBGC's claim, and the district court affirmed. The court of appeals upheld the lower courts, concluding that the Agency's regulation "does not extend" to bankruptcy proceedings.

This case raises a recurring question of great significance to PBGC—whether an agency's claim in bankruptcy must be determined in accordance with the statute and implementing regulation that establish the substantive liability. The resolution of that question by the court below was inconsistent with the fundamental precept of administrative law that a regulation promulgated under an express delegation has the force and effect of law, and with the long-standing bankruptcy principle that the substance of claims is governed by the applicable nonbankruptcy law.

Statutory Background

Modeled after the Federal Deposit Insurance Corporation, PBGC provides a mandatory insurance program to protect participants of defined benefit pension plans. *See generally PBGC v. LTV Corp.*, 496 U.S. 633, 636-39 (1990). The PBGC and the insurance program were established by Title

IV of ERISA, 29 U.S.C. §§ 1301-1461. PBGC is organized in corporate form, with a board of directors consisting of the Secretaries of Labor, Treasury, and Commerce. 29 U.S.C. § 1302(a), (d). The Agency is charged with (i) encouraging the continuation of private pension plans, (ii) providing for the payment of pension benefits to participants of terminated plans, and (iii) keeping employers' termination insurance premiums low. 29 U.S.C. § 1302(a). No funds from general federal revenues are available to finance the Agency's program operations. To fund the insurance program, ERISA imposes premiums on employers who sponsor defined benefit pension plans. In addition, the Agency obtains funds from the assets of terminated pension plans, recoveries from employers whose underfunded plans have terminated, and investment earnings. *See* 2000 PBGC Ann. Rep. i.

Title IV of ERISA sets forth the exclusive means of terminating a covered pension plan. 29 U.S.C. § 1341(a)(1); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 446 (1999). An employer may terminate a pension plan in a "standard" termination if the plan has sufficient assets to cover the future benefits of all participants and their beneficiaries. 29 U.S.C. § 1341(b). An employer may terminate an underfunded pension plan only if the employer and each member of its controlled group[5] demonstrate that they are in financial "distress." 29 U.S.C. § 1341(c). PBGC must terminate a plan "involuntarily" if the plan runs out of money to pay benefits that are currently due to plan participants. 29 U.S.C. § 1342(a). PBGC may also terminate a plan involuntarily if it determines that the plan will be unable to pay future benefits when due, the employer has failed to pay the statutory minimum funding contributions, or the risk of long-run loss to the

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[5] A "controlled group" is a group of trades or businesses under common control, e.g., a parent corporation and its 80-percent-owned subsidiaries. *See* 29 U.S.C. § 1301(a)(14); I.R.C. § 414(b), (c); 29 C.F.R. pt. 2612; Treas. Reg. § 1.414(b)-1, (c)-2.

insurance program may increase unreasonably if the plan is not terminated. *Id.*

Regardless of how a plan is terminated, the employer remains responsible for satisfying the cost of all benefits promised under the plan. To complete a standard termination, the employer is required to distribute plan assets to participants and their surviving beneficiaries, typically in the form of annuities purchased from a private insurer. 29 C.F.R. § 2617.28. The annuities must cover the lifetime benefits of plan participants and beneficiaries. *Id.* When a plan that does not have enough money to satisfy its benefit liabilities terminates in a distress or involuntary termination, PBGC typically becomes trustee of the plan, 29 U.S.C. §§ 1341(c), 1342, and assumes an unconditional obligation to pay participants and beneficiaries lifetime benefits up to the limits established in Title IV of ERISA. 29 U.S.C. §§ 1322, 1361. The employer, however, is not relieved of its liability for the benefits promised to participants and beneficiaries under the plan. Rather, the employer becomes liable to PBGC for the shortfall between the plan's assets and its promised benefits. 29 U.S.C. § 1362.

Originally, this termination liability was limited to the amount of unfunded benefits guaranteed under Title IV of ERISA, and could not exceed 30% of the net worth of the employer and its controlled group. 29 U.S.C. § 1362(b) (1976). In 1987, Congress amended ERISA to expand this liability and to define it more precisely.[6] First, Congress increased the liability to the "total amount of the unfunded benefit liabilities (as of the termination date)," and removed the net worth limitation. 29 U.S.C. § 1362(b)(1)(A). Next, Congress defined the "amount of unfunded benefit liabilities"

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[6] Pension Protection Act of 1987, Subtitle D of Title IX of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, §§ 9312(b)(2)(A), 9313(a)(2)(F), 1987 U.S.C.C.A.N. (101 Stat.) 1330-333, 1330-361, 1330-365.

as the difference between the value of the plan's assets and the value of its benefit liabilities. 29 U.S.C. § 1301(a)(18). Most important, Congress directed that the "value of the benefit liabilities under the plan" be determined "on the basis of assumptions prescribed by [PBGC] for purposes of section 1344 of this title."[7] *Id.* This language referred to an existing PBGC regulation under 29 U.S.C. § 1344 for valuing plan liabilities, which regulation had been published in 1981.[8] The regulation was revised in 1993 with no change to the basic methodology for determining benefit liabilities.[9] The regulation prescribes interdependent assumptions about mortality, retirement age, and interest that, in combination, produce a value of benefit liabilities that replicates the market price of insurance company annuity contracts. *See* 58 Fed. Reg. 5128 (1993) (preamble to proposed rule).

Proceedings Below

On November 22, 1993, Copperweld Steel Company and its affiliate, CSC Industries (the "Debtors"), filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the Northern District of Ohio. Copperweld's three underfunded pension plans were terminated effective September 30, 1995. In accordance with ERISA, PBGC determined each plan's unfunded benefit liabilities by first determining the benefit liabilities as of September 30, 1995, using the assumptions prescribed in the

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[7] Section 1344 dates from ERISA's enactment in 1974. It governs the allocation of a terminating plan's assets to its benefit liabilities so that a determination can be made whether the assets are sufficient to cover the benefits. *See generally Mead Corp. v. Tilley*, 490 U.S. 714, 717-18, 723 (1989).

[8] *See* Valuation of Plan Benefits in Non-Multi-Employer Plans, 46 Fed. Reg. 9492 (1981), *codified at* 29 C.F.R. pt. 2619 (1981).

[9] Valuation of Plan Benefits in Single-Employer Plans, 58 Fed. Reg. 50,812 (1993), *codified at* 29 C.F.R. pt. 2619 (1995), *recodified at* 29 C.F.R. § 4044.41-.75 (1996).

regulation, and then subtracting the plan's assets as of that date. The total benefit liabilities for the three plans were $176,389,927, and the total assets were $126,731,224. Thus, the total unfunded benefit liabilities were $49,658,703. PBGC filed a separate proof of claim for each plan's unfunded benefit liabilities. The Debtors' plan of reorganization created a cash reserve to cover the maximum pro rata amount that PBGC could recover on these claims.[10]

Katherine Belfance, Trustee of the Copperweld Steel Company Liquidation Trust, initiated an adversary proceeding on November 22, 1995, objecting to the amount of PBGC's unfunded benefit liabilities claims. Following discovery, the parties filed cross motions for summary judgment. PBGC relied on ERISA and the implementing regulation. Belfance asserted that the court should disregard the interest component of the interdependent regulatory assumptions, and instead substitute a so-called "prudent investor rate" to be derived from expert testimony.

On December 3, 1997, the bankruptcy court issued its opinion. The court stated that PBGC would receive a "windfall" if the claim amounts were determined in accordance with ERISA and the implementing regulation. (Pet. App. 7a.) Accordingly, the court held that the amount of the unfunded benefit liabilities claims should be determined on the basis of Belfance's "prudent investor" theory. *Id.* The court also held that it would conduct an evidentiary hearing to ascertain "what may be the appropriate rate to apply." *Id.*

Subsequently, PBGC and Belfance entered into a partial settlement agreement under which the parties resolved all remaining factual disputes and agreed to narrow certain legal issues. To eliminate the need for a trial, the parties stipulated for purposes of this case only that the amount of the unfunded

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[10] PBGC also filed a claim for unpaid minimum funding contributions. PBGC is not seeking *certiorari* on any issue relating to that claim.

benefit liabilities claims produced under the "prudent investor" theory was $1,822,075, and the amount produced under the regulatory methodology was $49,658,702. The bankruptcy court signed an order approving the partial settlement agreement on November 30, 1998. On December 8, 1998, consistent with its opinion, the bankruptcy court issued a final judgment in the adversary proceeding, disallowing all but $1,822,075 of the unfunded benefit liabilities claims. (Pet. App. 11a.)

PBGC appealed to the district court on December 16, 1998. On August 10, 1999, the district court issued an order affirming the bankruptcy court's judgment. The district court concluded that "[a]lthough PBGC's valuation method is valid in other contexts, . . . it is not the appropriate valuation method in Bankruptcy Court." (Pet. App. 18a.) Following the reasoning of the Tenth Circuit on this issue in *PBGC v. CF&I Fabricators of Utah, Inc. (In re CF&I Fabricators of Utah, Inc.)*, 150 F.3d 1293 (10th Cir. 1998), *cert. denied*, 526 U.S. 1145 (1999), the district court concluded that Congress's express direction that the amount of benefit liabilities be calculated in accordance with the regulation conflicts with the "cardinal rule" of section 1123(a)(4) of the Bankruptcy Code that "all claims within the same class must be treated alike." (Pet. App. 18a.) The court then concluded, based on the Tenth Circuit's decision in *CF&I*, that under 29 U.S.C. § 1144(d), "when ERISA conflicts with another provision of federal law, ERISA must be subordinated." (Pet. App. 18a.) Accordingly, it upheld the use of the "prudent investor" theory to calculate PBGC's claims. (Pet. App. 26a.)

PBGC appealed to the Sixth Circuit on October 14, 1999. The court of appeals affirmed the district court's decision on November 17, 2000. The court rejected the primary basis of the Tenth Circuit's ruling in *CF&I*, stating that it was "not entirely persuaded that the district and *CF&I* courts were correct in concluding that 29 U.S.C. § 1144(d) . . . requires

that the ERISA provision, 29 U.S.C. § 1301(a)(18), be subordinated to the Bankruptcy Code." (Pet. App. 25a.) The court stated that "[s]ection 1144(d), on its face, applies only to subchapter I of ERISA, whereas the definition of unfunded benefit liabilities, section 1301(a)(18), is found in subchapter III of ERISA."[11] (Pet. App. 25a.)

Nevertheless, the court reached the same result as the Tenth Circuit, concluding that "the bankruptcy court's authority under 11 U.S.C. §§ 502(b) and 1123(a)(4) to determine the amount of claims . . . and treat creditors in the same class equally gives it authority to value unfunded benefit liabilities claims using a 'prudent investor rate.'" (Pet. App. 25a.) The court stated that PBGC was seeking "preferential treatment" of its claim (Pet. App. 23a), and held that the Agency's statutory "authority to promulgate regulations governing the valuation of unfunded benefit liabilities does not extend so far as to subordinate the authority of the bankruptcy courts to value claims in bankruptcy proceedings." (Pet. App. 26a.) The court acknowledged this Court's decision in *Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15 (2000), which held that the "substance of claims" is governed by nonbankruptcy law, but concluded that this principle applies only to the "validity of a claim." (Pet. App. 26a.)

REASONS FOR GRANTING THE PETITION

This case presents a recurring issue that has plagued PBGC for more than a decade—whether the Agency's claim in bankruptcy against the sponsor of a terminated pension plan must be determined in accordance with the federal statute and implementing regulation that create the liability and define its amount. When a plan terminates, ERISA provides that the employer is liable to PBGC for the full amount of the shortfall between the benefits it promised and the plan's assets.

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[11] Subchapter I of ERISA refers to Title I, and subchapter III refers to Title IV. *See* Historical Note following 29 U.S.C.A. § 1144 (1985).

Congress expressly provided that the amount of this termination liability is to be determined on the basis of assumptions prescribed by PBGC. The Agency prescribed such assumptions in a duly promulgated regulation after notice and comment rulemaking. This carefully calibrated levy acts as a counterweight to any incentive an employer may have to dump a pension plan on PBGC to rid itself of an unwanted financial burden. But courts have consistently ignored this regulation when determining the Agency's claims in bankruptcy, throwing off the delicate statutory balance.[12]

This refusal to follow the applicable substantive law in bankruptcy has profound implications for PBGC and the constituencies it serves. ERISA's distress and involuntary termination provisions restrict the termination of underfunded pension plans to circumstances in which, as a practical matter, the employer is almost always in bankruptcy. Thus, most underfunded pension plans terminate in bankruptcy, and PBGC typically asserts its claim in that context. Indeed, last year the Agency had about $1.9 billion in termination liability claims pending against employers in bankruptcy. Eight of the ten largest plan terminations in PBGC's history, representing a transfer of about $3 billion in unfunded liabilities to the insurance program, have involved bankruptcies.

Despite the fact that one of the primary purposes of Title IV of ERISA is "to encourage the continuation and maintenance" of pension plans for the benefit of employees, 29 U.S.C. § 1302(a)(1), the decision below gives an employer with an underfunded pension plan a powerful incentive to reorganize in bankruptcy and terminate the plan. Moreover, by authorizing a different method for determining a pension

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[12] In addition to the decision below, see *PBGC v. CF&I Fabricators*, 150 F.3d at 1300-01, and *LTV Corp. v. PBGC (In re Chateaugay Corp.)*, 130 B.R. 690, 695-96 (S.D.N.Y. 1991), 126 B.R. 165 (Bankr. S.D.N.Y. 1991) and 115 B.R. 760, 767-71 (Bankr. S.D.N.Y. 1990), *vacated by consent order*, 17 Employee Benefits Cas. (BNA) 1102 (S.D.N.Y. 1993).

plan's unfunded benefit liabilities when an employer is in bankruptcy, the decision interferes with PBGC's ability to administer Title IV of ERISA in a uniform manner. As a result, the Agency, the public, plan participants, companies that sponsor pension plans, and those companies' creditors and potential buyers have less certainty about the adequacy of a pension plan's funding.

The reasoning of the decision below is deeply flawed. It conflicts with the fundamental doctrine of administrative law that courts are not to second guess an agency's policy choices, particularly when such choices are embodied in a rule of general applicability adopted pursuant to an express delegation. It also ignores the foundations of bankruptcy law by allowing the substance of a claim to be determined without regard to the substantive law under which the claim originates. Indeed, the court of appeals' holding that the regulation "does not extend" to bankruptcy is a stark departure from this Court's recent decision in *Raleigh*, which held that the "substance of claims" in bankruptcy is governed by the applicable nonbankruptcy law. 530 U.S. at 20.

Because of its importance to both regulatory and bankruptcy jurisprudence, as well as to the nation's pension insurance program, the decision below warrants review. There is now an unbroken line of appellate and lower court decisions holding that PBGC's regulation does not apply in bankruptcy. Given the nature of bankruptcy practice and the two layers of review in the bankruptcy appellate process, it is likely to be many years before the issue of PBGC's termination liability claim can be presented to another court of appeals. The decision below, however, has an immediate and continuing impact on the Agency, particularly in light of the slowdown in the U.S. economy and the recent wave of corporate bankruptcies. Immediate review by this Court is thus essential to the pension insurance program.

I. BY CREATING A DOUBLE STANDARD BASED ON WHETHER A COMPANY IS IN BANKRUPTCY, THE DECISION BELOW UNDERMINES THE NATION'S PENSION INSURANCE SYSTEM

The federal pension insurance system addresses "the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp. v. PBGC*, 446 U.S. 359, 374 (1980) (footnote omitted). Congress wanted to "mak[e] sure that if a worker has been promised a defined pension benefit upon retirement . . . he actually will receive it. The termination insurance program is a major part of Congress' response to the problem." *Id.* at 375. *See also PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 720 (1984); *PBGC v. LTV Corp.*, 496 U.S. at 637.

A central concept in Title IV of ERISA is that an employer who sponsors a pension plan remains liable for the underfunding, even if the plan is terminated through the insurance program. This Court recognized in *Nachman* that Congress "determined that it would not be possible to maintain an effective insurance program without imposing some liability on employers. The abuses employer liability was designed to cure included terminations motivated by a desire to avoid the continued burden of funding." 446 U.S. 367-68 n.12. In the Pension Protection Act of 1987, Congress strengthened this scheme by making employers liable for the total amount of a pension plan's unfunded benefit liabilities, and by removing the 30%-of-net-worth limitation.[13]

In the same 1987 legislation, Congress also recognized PBGC's vital regulatory role in enforcing termination liability. With unmistakable clarity, Congress provided that an employer's liability is to be "determined . . . on the basis of

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[13] Pension Protection Act of 1987, *supra* note 6, § 9312(b)(2)(A).

assumptions prescribed by [PBGC] for purposes of section 1344 of this title." 29 U.S.C. § 1301(a)(18).[14] By mandating use of these assumptions against the backdrop of a specific, preexisting regulation, Congress effectively ratified the regulatory methodology. *See Cottage Sav. Ass'n v. Commissioner*, 499 U.S. 554, 561 (1991). And, as confirmed by the language of ERISA's distress and involuntary termination provisions, Congress plainly contemplated that Title IV of ERISA would operate in bankruptcy. For example, Congress provided that an employer who "has filed . . . a petition seeking liquidation in a case under title 11" or "a petition seeking reorganization in a case under title 11" may meet the requirements for a distress termination. 29 U.S.C. § 1341(c)(2)(B)(i)(I), (ii)(I). Similarly, Congress provided that PBGC may involuntarily terminate a plan "notwithstanding the pendency in the same or any other court of any bankruptcy . . . proceeding." 29 U.S.C. § 1342(e). The termination liability provision, in turn, expressly applies "[i]n any case in which a single-employer plan is terminated in a distress termination . . . or a termination otherwise instituted by [PBGC] . . . ." 29 U.S.C. § 1362(a).

The decision below, however, is one of an unbroken line that has refused to apply the regulatory methodology when determining PBGC's claim in bankruptcy. In the first LTV bankruptcy, the bankruptcy court insisted that "[a]lthough ERISA entitles the PBGC under applicable administrative law restrictions to set the discount rate for determination of termination liability, in the reorganization context this right must be subordinated to other policies." *LTV*, 115 B.R. at 768. The district court adopted the bankruptcy court's rec-

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[14] *See* Pension Protection Act of 1987, *supra* note 6, § 9313(a)(2)(F).

ommendation, reasoning that ERISA should be "subordinated" to the Bankruptcy Code. 130 B.R. at 696.[15]

Again, in *CF&I*, the bankruptcy court, the district court, and the Tenth Circuit refused to apply the regulation when determining PBGC's claim. *See PBGC v. CF&I Fabricators*, 150 F.3d at 1296. The Tenth Circuit recognized that the regulatory methodology was properly adopted under an express congressional grant of rulemaking authority, but reasoned that "[e]ven though that methodology was adopted in the exercise of PBGC's administrative authority, we have no doubt of its inapplicability in the world of bankruptcy." 150 F.3d at 1301. The Sixth Circuit has now reached the same result, though it disagreed with a critical element of the Tenth Circuit's reasoning.[16]

These decisions permit an employer to wipe out a substantial amount of liability by terminating its pension plan while in bankruptcy. This cut takes place *before* PBGC's collection is limited to a pro rata share of distributions to all unsecured creditors. In *LTV*, the bankruptcy court's ruling would have reduced PBGC's termination liability claim from about $222 million to about $158 million. In *CF&I*, the Agency's claim was nearly halved, from $221 million to $123 million. In this case, the Agency's claim of $49.7 million was nearly eliminated, as all but $1.8 million was disallowed.

More important than the raw dollar figures, however, are the perverse economic incentives created by these decisions. For many companies in financial distress, pensions represent one of the largest liabilities and fixed costs. This can also be true for relatively healthy companies. The prospect of having the government cover these obligations with little or no re-

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[15] This ruling concerned an LTV pension plan that was not among the three plans involved in the restoration dispute decided by this Court. *See* 496 U.S. 633.

[16] *See infra* pp. 21-22.

sponsibility for repayment would provide considerable temptation to step into a bankruptcy reorganization. Moreover, companies that are in bankruptcy for other reasons would face considerable pressure from creditors to terminate their pension plans with reduced termination liability, rather than emerge from bankruptcy with significantly underfunded plans. And when a company terminates its underfunded pension plan while in bankruptcy to reduce its cost of doing business, other companies in the same industry will face competitive pressure to do the same.

By contrast, uniform application of the regulation promotes the continuation of pension plans, one of the primary objectives of Title IV of ERISA. *See* 29 U.S.C. § 1302(a)(1). When pension plans remain ongoing, employees continue to earn retirement benefits. Moreover, uniform application of the regulation assures that companies do not receive a "free ride" from the insurance system, and thus brings a measure of fairness to companies that continue their plans and pay premiums to support the insurance system. And it deters employers from making improvident pension promises, which in turn reduces the "moral hazard" of the insurance program.[17] *See Nachman*, 446 U.S. at 367-68 n.12; *LTV*, 496 U.S. at 650-51.

By authorizing different measures of termination liability depending upon whether an employer is in bankruptcy, the decision below makes it impossible for PBGC to administer Title IV of ERISA in a uniform manner. For example, under Title IV, each member of the employer's controlled group—a group of trades or businesses under common control—is jointly and severally liable for a pension plan's unfunded benefit liabilities. 29 U.S.C. § 1362(a). Under the court of

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[17] *See* GAO, Pension Benefit Guaranty Corporation: Financial Condition Improving, but Long-Term Risks Remain 17-18 (1998) [hereinafter GAO Report].

appeals' decision, an employer in bankruptcy will be liable to PBGC for one amount, and a nonbankrupt member of its controlled group will be jointly and severally liable, but for a different amount. This is an anomalous result, and could induce members of a bankrupt employer's controlled group to declare bankruptcy themselves.

By holding that PBGC's regulation does not apply in bankruptcy, the decision below requires a battle of experts in each case. And the decision provides no objective standard for courts to apply. This encourages forum shopping by employers who wish to reorganize in bankruptcy and terminate underfunded pension plans, promotes endless litigation, and creates competitive distortions among employers in the same industry. Moreover, because the regulation will not be applied uniformly, creditors, employees, and potential buyers of companies with underfunded pension plans have less certainty when evaluating an employer's pension liability.

In short, by offering bargain-basement terminations, the decision upsets the design of ERISA, a "comprehensive and reticulated statute," *Nachman*, 446 U.S. at 36, and strikes at the heart of the Title IV insurance program.

II. THE DECISION BELOW IS INCONSISTENT WITH FUNDAMENTAL PRECEPTS OF ADMINISTRATIVE LAW AND BANKRUPTCY LAW

Like its precursors, the decision below departs from two well-established bodies of law. The court held that "PBGC's authority to promulgate regulations governing the valuation of unfunded benefit liabilities does not extend" to bankruptcy. (Pet. App. 26a.) This holding disregards the basic precept of administrative law that an agency regulation promulgated pursuant to an express statutory grant has the force of law. Further, the decision conflicts with the basic principle of

bankruptcy law, reaffirmed by this Court in *Raleigh*, that the substance of claims is governed by nonbankruptcy law.

Regulations adopted pursuant to an express delegation give rise to legislative rules that have the "force and effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979); *Batterton v. Francis*, 432 U.S. 416, 425 & n.9 (1977). "In a situation of this kind, Congress entrusts to the [agency], rather than to the courts, the primary responsibility for interpreting the statutory term." *Batterton*, 432 U.S. at 425. Just this Term, the Court confirmed that such a delegation " 'helps guarantee that the rules will be written by "masters of the subject" . . . who will be responsible for putting the rules into effect.' " *United States v. Cleveland Indians Baseball Co.*, 121 S.Ct. 1433, 1444 (2001) (citation omitted). *See also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, 866 (1984) ("federal judges—who have no constituency—have a duty to respect legitimate policy decisions made by those who do").

PBGC's regulation prescribing the assumptions for measuring termination liability was duly adopted after notice and comment rulemaking in full compliance with the Administrative Procedure Act. It has *never* been challenged as arbitrary and capricious. Thus, there is no reason that the regulation should not govern in all forums, including bankruptcy.

An agency should not be forced "continually to relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding." *Heckler v. Campbell*, 461 U.S. 458, 467 (1983). *See also SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency"). By publishing guidelines through rulemaking, an agency promotes uniformity. *See Heckler*, 461 U.S. at 468. PBGC's regulation for measuring termination liability promotes uniformity by replicating, based on quarterly industry surveys,

the price that an employer would have to pay to close out a pension plan through the purchase of annuities in the marketplace. This assures that termination liability will be measured in a fair, objective, and consistent manner. By contrast, the decision below requires PBGC to relitigate termination liability in each bankruptcy case through a battle of experts. Bankruptcy judges will be free to determine PBGC's claims according to their own notions of equity, rather than a uniform regulation promulgated by the agency charged with administering the statute.

The decision below is also wholly inconsistent with bankruptcy principles. In particular, the decision cannot be reconciled with the long-standing bankruptcy principle that a claim is determined in accordance with the substantive nonbankruptcy law under which it arises. *See Butner v. United States*, 440 U.S. 48, 55 (1979); *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 161-62 (1946).[18] There is no basis for a bankruptcy court to ignore a valid regulation that defines a party's liability to a government agency when that regulation provides the substantive law for determining the liability.

The error in the line of cases culminating in the decision below is all the more apparent in light of this Court's decision

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[18] Courts have recognized that substantive law determines liability in bankruptcy to governmental and private parties alike. *See Unsecured Creditors' Comm. of Highland Superstores v. Strobeck Real Estate (In re Highland Superstores)*, 154 F.3d 573 (6th Cir. 1998) (damages for lease rejection); *United States v. Craddock (In re Craddock)*, 149 F.3d 1249 (10th Cir. 1998) (tax penalty); *United States v. Sanford (In re Sanford)*, 979 F.2d 1511 (11th Cir. 1992) (tax penalty); *Ohio v. Collins (In re Madeline Marie Nursing Homes)*, 694 F.2d 433 (6th Cir. 1982) (medicaid overpayment) (Bankruptcy Act case); *United Merchants & Mfrs. v. Equitable Life Assurance Soc'y (In re United Merchants & Mfrs.)*, 674 F.2d 134 (2d Cir. 1982) (contractual collection costs) (Bankruptcy Act case); *Murgillo v. California State Bd. of Equalization (In re Murgillo)*, 176 B.R. 524 (B.A.P. 9th Cir. 1995) (sales tax).

in *Raleigh*. In *Raleigh*, this Court held that "[c]reditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation." 530 U.S. at 20. The Court reaffirmed that "[t]he 'basic federal rule' in bankruptcy is that state law governs the substance of claims." [19] *Id.* (citing *Butner*, 440 U.S. at 57). Further, the Court stated that "[b]ankruptcy courts are not authorized in the name of equity to make wholesale substitution of underlying law controlling the validity of creditors' entitlements." *Id.* at 24-25.

The court below, however, distinguished *Raleigh* on the ground that this Court's decision spoke only to the use of nonbankruptcy law in determining the *validity* of a claim, while the case before it turned on the use of nonbankruptcy law to determine the *amount* of the claim. (Pet. App. 26a.) The court of appeals presented no reasoning to support this distinction, and there is none. To determine the amount of a state or federal claim in bankruptcy in disregard of the body of law that gives rise to it is just as problematic as shifting the burden of proof. Indeed, a shift in the burden of proof can affect the amount as well as the validity of a claim. And the measure of damages is every bit as "substantive" as the burden of proof. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 428 (1996). *See Raleigh*, 530 U.S. at 20.

This Court's reasoning in *Raleigh* undermines the court of appeals' artificial distinction between validity and amount. *Raleigh* rests on the premise that bankruptcy provides a forum for the resolution of claims that arise under different bodies of law. Bankruptcy does not seek to displace the substantive law under which the claims arise. *See* 530 U.S. at 20; *IRS v. Levy (In re Landbank Equity Corp.)*, 973 F.2d 265,

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[19] In this context, the term state law "refer[s] to all nonbankruptcy law that creates substantive claims" including "claims that have their source in substantive federal law, such as federal securities law or other federal antifraud laws." *Grogan v. Garner*, 498 U.S. 279, 283-84 & n.9 (1991).

270 (4th Cir. 1992) ("the Bankruptcy Code . . . while providing a forum and procedures for an expedient dispute resolution, does not endeavor to supplant the substantive law under which the claim against the estate . . . arose").

The court below sought a basis for modifying the amounts of PBGC's claims in the principle of equality of distribution embodied in 11 U.S.C. § 1123(a)(4). But this provision—one of the criteria for the contents of a reorganization plan—deals with *distributions* on allowed claims. In requiring the "same treatment" for each claim of a particular class, it addresses how claims are to be treated under a plan of reorganization *after* they have been determined and allowed by the bankruptcy court. It simply calls for pro rata payment to claims in the same class. *See In re AOV Indus., Inc.*, 792 F.2d 1140, 1152 (D.C. Cir. 1986). *Accord Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 56 (1989) (discussing "creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res"). Principles of equal distribution, however, are not relevant to the determination of claims.

In *Raleigh*, this Court distinguished between the "substance" of claims, which is governed by nonbankruptcy law, and the "ordering" of claims for distribution purposes, which is a matter of bankruptcy law. 530 U.S. at 23-24. Rejecting an argument based on *Vanston*, 329 U.S. 156, that allowance of claims is a matter of federal equity principles, the Court explained in *Raleigh* that at the time *Vanston* was decided "'allowance' referred to the ordering of valid claims . . . and *Vanston*, in fact, concerned distribution of assets, not the validity of claims in the first instance." 530 U.S. at 23-24 (citing *Fahs v. Martin*, 224 F.2d 387, 394-95 (5th Cir. 1955)). Indeed, this Court has consistently recognized that principles of equality govern making distributions to creditors, not determining the substance of claims. *See, e.g., Begier v. IRS*, 496 U.S. 53, 58 (1990) ("Equality of distribution among creditors is a central policy of the Bankruptcy Code. Accord-

ing to that policy, creditors of equal priority should receive pro rata shares of the debtor's property"). And as the Court observed in *Raleigh*, another compelling equality principle is "equal treatment of comparable creditors in and out of bankruptcy." 530 U.S. at 25.

The courts that have refused to follow ERISA and the implementing regulation, however, have relied heavily on the notion that their approach was needed to assure equal treatment of creditors. In *LTV*, the bankruptcy court held that the regulation did not apply in bankruptcy, "based upon the Congressional mandate that there should be a fair and uniform distribution among creditors." 115 B.R. at 768. In *CF&I*, the Tenth Circuit held that applying the regulation would violate "the cardinal rule that all claims within the same class must be treated alike." 150 F.3d at 1301. And in this case, the court of appeals held that the amount of a claim is governed by the "bankruptcy court's authority under 11 U.S.C. §§ 502(b) and 1123(a)(4) to determine the amount of claims . . . and treat creditors in the same class equally."[20] (Pet. App. 25a.) This confusion of the equality of distribution principle with the choice of law rule that governs the substance of claims demonstrates the need for further guidance from this Court.

In addition, the Sixth Circuit equivocated about the relationship between ERISA and the Bankruptcy Code. It both quoted at length from the Tenth Circuit's decision holding that ERISA must be "subordinated" to the Bankruptcy Code, and attacked the central support for that thesis. (Pet. App. 25a.) It noted that the pertinent provision of ERISA on which the Tenth Circuit relied, 29 U.S.C. § 1144(d), did not apply to

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[20] Under 11 U.S.C. § 502(b), a bankruptcy court must "determine the amount of [a] claim."

Title IV.[21] (Pet. App. 25a.) Thus, the two courts of appeals reached the same result while disagreeing on crucial aspects of the rationale.

There was no need for either court to manufacture a conflict between ERISA and the Bankruptcy Code. "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). *See also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992); *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 375-76 (1990). The Sixth Circuit should have held that, although the Bankruptcy Code governs the *distribution* on PBGC's claim, the *amount* of the claim must be determined in accordance with ERISA.

By injecting into the claims determination process an equity principle that governs only the distribution process, the decision below allows bankruptcy judges to level claims in the name of equality. A ruling by this Court is necessary to make clear that bankruptcy courts must determine claims in accordance with the "underlying substantive law creating the debtor's obligation," *Raleigh*, 530 U.S. at 20, and that the principle of equality is relevant to distribution, but not to determination of claims.

III. IMMEDIATE REVIEW IS ESSENTIAL TO THE NATION'S PENSION INSURANCE SYSTEM

The issue this case presents has major practical implications for PBGC's self-financing program. The program protects 43 million workers in nearly 38,000 pension plans spon-

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[21] The court stated that "[s]ection 1144(d), on its face, applies only to subchapter I of ERISA, whereas the definition of unfunded benefit liabilities, section 1301(a)(18), is found in subchapter III of ERISA." (Pet. App. 25a.) Subchapter III refers to Title IV. *See supra* note 11.

sored by private employers. In 2000, PBGC paid $903 million in benefits to 226,700 retirees. 2000 PBGC Ann. Rep. i, 1.

The decision below means that courts can ignore PBGC's regulation in precisely the arena where it is most needed—bankruptcy. PBGC is a creditor in hundreds of bankruptcies at any given time. In 2000, PBGC had about $1.9 billion in termination liability claims pending in bankruptcies nationwide. During the period 1975-99, termination of over 2,700 underfunded plans resulted in transfer of about $6.3 billion in unfunded liabilities to the PBGC insurance program. Most of these claims arose from the bankruptcies of plan sponsors. The ten largest plan terminations accounted for about $3.3 billion, or 52%, of the total unfunded liabilities. Among the ten largest terminations, eight involved bankruptcies. They accounted for about $3 billion of the total. *See* PBGC, *Pension Insurance Data Book 1999* 28 (tab. S-12) (2000); PBGC, *Pension Insurance Data Book 1997* 10 (1998).

Although PBGC's single-employer program posted an overall surplus for the last five reported years, it suffered deficits in *all* the preceding 21 years. *See* 1997 PBGC Ann. Rep. 1; 1996 PBGC Ann. Rep. 1. As the General Accounting Office cautioned in an October 1998 report:

> While PBGC's financial condition has significantly improved, risks to the long-term financial viability of the insurance programs remain. Continued underfunding among some large plans poses a risk to the agency. PBGC also remains vulnerable to other risks, such as downturns in the economy, problems in certain economic sectors, and declines in interest rates. An economic downturn and the termination of a few plans with large unfunded liabilities could quickly reduce or eliminate PBGC's surplus.

GAO Report 23.

In light of the recent slowdown in the U.S. economy, the threat of an economic downturn is no longer an abstraction. This threat is especially acute in the steel industry, where the pension insurance system has historically faced its greatest exposure. In the period 1975-99, the steel industry produced six of the ten largest plan terminations in the Agency's history. About $2 billion of the unfunded liabilities transferred to the insurance program during this period were from the primary metals industry, and the bulk of these were from steel companies. *See* PBGC, *Pension Insurance Data Book 1999* 28 (tab. S-12), 31 (tab. S-15).

Since mid-1998, seventeen steel companies have filed for bankruptcy.[22] Of these seventeen, at least eleven have defined benefit pension plans, representing potential additional exposure to the insurance program of nearly $2 billion. Since late 2000, several of these companies, including LTV Corporation, Wheeling-Pittsburgh Steel, Republic Technologies, and CSC, Ltd., have filed for bankruptcy in Ohio, where the decision below is controlling law. Indeed, the Sixth Circuit's opinion will govern all future proceedings on PBGC's termination liability claim in Ohio and Michigan, two key states within the industrial heartland. Whether review is granted could therefore have a major influence on the economic incentives in those cases.

Moreover, it is likely to be many years before PBGC can posture a case on its termination liability claim for a decision by another court of appeals. There is intense pressure to settle bankruptcy claims when all major parties and the bankruptcy court insist that a successful reorganization is at stake. And because of its status as a government agency, as well as its status as a major creditor, PBGC has an interest in seeing a productive business remain ongoing.

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[22] *See* United Steelworkers of America, Rapid Response Conference, *The Crisis in American Steel* 12 (Apr. 5, 2001).

Even when bankruptcy court disputes are pressed to a decision, obtaining effective appellate review is difficult. Once a plan of reorganization is confirmed and property of the estate is distributed, appeals are rendered moot unless the parties have agreed to establish a litigation reserve. Negotiating a litigation reserve to preclude mootness problems on appeal is itself a complex undertaking, and not always feasible. And when a bankruptcy court decision is appealed, it must pass through an intermediate appellate stage before reaching a court of appeals.

Thus, as a practical matter, it is unlikely that PBGC will be able to obtain review of its termination liability claim by another court of appeals in the near future. But the impact of the decision below is immediate. The wave of recent bankruptcies means that employers will likely face greater pressure to terminate underfunded pension plans in bankruptcy, and that the Agency will face continued reduction of its termination liability claims. As a result, the decision below will flourish as a perverse incentive for employers to terminate their pension plans. Immediate review by this Court is thus essential.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES J. KEIGHTLEY *
General Counsel
WILLIAM G. BEYER
Deputy General Counsel
ISRAEL GOLDOWITZ
SUSAN E. BIRENBAUM
Assistant General Counsels
KENNETH J. COOPER
NATHANIEL RAYLE
GARTH D. WILSON
Attorneys

PENSION BENEFIT GUARANTY CORPORATION
1200 K Street, N.W.
Washington, D.C. 20005
(202) 326-4020

Of Counsel:
CHARLES G. COLE
STEPTOE & JOHNSON, L.L.P.
1330 Connecticut Ave., N.W.
Washington, D.C. 20036-1795
(202) 429-3000

* Counsel of Record

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APPENDICES

APPENDIX A

[Filed Dec. 3, 1997]

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

CASE NUMBER 93-41898,
CASE NUMBER 93-41899,

In re: CSC INDUSTRIES, INC.
and COPPERWELD STEEL COMPANY,
Debtors.

KATHRYN A. BELFANCE, Trustee of the Copperweld Steel Company Liquidation Trust,
Plaintiff,

vs.

PENSION BENEFIT GUARANTY CORPORATION,
Defendant.

ADVERSARY NUMBER 95-4103

MEMORANDUM OPINION

Debtors filed their petition for relief under Chapter 11 of Title 11, United States Code, on November 22, 1993. A plan was confirmed by the Court which became effective October 12, 1995 and the two cases originally filed were consolidated by the terms of the plan. Pursuant to the confirmed plan, Kathryn A. Belfance, Esq. was appointed Trustee for the Liquidation Trust (hereafter "Trustee") and a representative of the estate pursuant to the provisions of 11 U.S.C. § 1123(b)(3). The cause is now before the Court on cross-motions for partial summary judgment. This is a core

proceeding and the following constitutes the Court's findings and conclusions pursuant to FED. R. BANKR. P. 7052.

STANDARD OF REVIEW

SUMMARY JUDGMENT

The procedure for granting summary judgment is found in FED. R. CIV. P. 56(c), made applicable to this proceeding through FED. R. BANKR. P. 7056, which provides in part that

> the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The evidence must be viewed in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). Summary judgment is not proper if there is a material dispute over the facts, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Summary judgment is appropriate, however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). See also *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

The Sixth Circuit has recognized that *Liberty Lobby*, *Celotex* and *Matsushita* effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. *Street v. J.C. Bradford & Co.*, 886 F.2d

1472, 1476 (6th Cir. 1989). In responding to a proper motion for summary judgment, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street*, 886 F.2d at 1479 (quoting *Liberty Lobby*, 477 U.S. at 257). The nonmoving party must introduce more than a scintilla of evidence to overcome the summary judgment motion. *Street*, 886 F.2d at 1479. It is also not sufficient for the nonmoving party merely to "show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Moreover, "the trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street*, 886 F.2d at 1479. That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine is sue of material fact.

This line of cases emphasizes the point that when one party moves for summary judgment, the nonmoving party must take affirmative steps to rebut the application of summary judgment. Courts have stated that:

> Under *Liberty Lobby* and *Celotex*, a party may move for summary judgment asserting that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict, and if the opposing party is therefore unable to demonstrate that he can do so, summary judgment is appropriate. "In other words, the movant could challenge the opposing party to 'put up or shut up,' on a critical issue [and] . . . if the respondent did not 'put up,' summary judgment was proper."

Fulson v. City of Columbus, 801 F. Supp. 1, 4 (S.D. Ohio 1992) (quoting Street, 886 F.2d at 1478).

ISSUES

Three different retirement plans of Debtors were terminated on September 30, 1995 by the confirmed Chapter 11 plan. The Pension Benefit Guaranty Corporation (hereafter "PBGC") has filed various claims pursuant to their termination. These claims are for (1) unpaid premiums and interest owed by Debtors to PBGC (the "Premium Claims"), (2) claims for unfunded or underfunded benefit liabilities (the "Unfunded Benefit Claims"), and (3) claims based on Debtors' alleged failure to meet minimum funding requirements (the "Minimum Funding Claims"). The PBGC argues that the Premium Claims relating to one or more of the plans are entitled to a first priority administrative expense treatment. It also argues that the Minimum Funding Claims up to One Million Dollars shall be treated as general unsecured claims and all such Minimum Funding Claims exceeding One Million Dollars shall be entitled to first priority administrative expense treatment. The Trustee seeks declaratory judgment regarding certain of the claims and the method by which the claims were calculated by the PBGC. The Trustee also seeks equitable subordination of certain of the claims.

Both the Trustee and the PBGC now seek summary judgment regarding certain of the issues here presented. The Trustee seeks partial summary judgment on the following issues: (a) that the PBGC has no Unfunded Benefit Claims because all affected plans were overfunded on the termination date; (b) that the PBGC has no Minimum Funding Claims because it has no Unfunded Benefit Claims; (c) that if the Court finds that PBGC has Unfunded and Minimum Funding Claims, the Unfunded Benefit Claims should be reduced dollar for dollar by any allowed Minimum Funding Claims; and (d) if any Minimum Funding Claims are found, only the part attributable to normal costs should be entitled to any

§ 507 priority. (Trustee's Motion for Partial Summary Judgment at 2).

The PBGC seeks summary judgment (a) on both the allowability and amount of Unfunded Benefit Claims, calculated in accordance with assumptions prescribed by regulations of the PBGC and (b) on the priority and amount of the production and maintenance plan's claim for unpaid Minimum Funding Claims. In this regard, the PBGC asserts that unpaid Minimum Funding Claims in excess of One Million Dollars should be accorded a first administrative priority and any claim up to One Million Dollars be allowed as a general unsecured claim. The PBGC further asserts that if the Court decides the PBGC regulations do not apply in determining if the plans are underfunded, an actual dispute exists and a trial is necessary. (PBGC's Memorandum of Law in Support of Summary Judgment at 9-24; PBGC's Motion for Production and Maintenance Employees for Summary Judgment at 2).

DISCUSSION

It seems fundamental that the PBGC could have no Unfunded Benefit Claims if all the affected plans were overfunded on the date of their termination. Both the Trustee and the PBGC agree that the appropriate inquiry with regard to the funding issue requires a determination of the fair value of the assets. The test for determining the fair value is "the price at which property would change hands between a willing buyer and willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts." 29 C.F.R. § 4001.2; *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 128 L. Ed. 2d 556, 114 S. Ct. 1757 (1994).

In arriving at his opinion of plan assets, PBGC's expert, Mr. Robert Amenta, used the Harris Trust report. (Amenta Deposition at 35). The difference between his valuation

overall and the Trustee's valuation is that he applied a liquidity discount to value the assets as of the termination date on the assertion that certain of the assets may not have been marketable on that date. However, given the total value of the assets of the plans and the fact that the assets need not have been liquidated on the termination date, the Court concludes the liquidation discount relied upon by Mr. Amenta is inappropriate. Furthermore, it appears certain of the assets for which the discount was used have been since sold at more than the witness valued them in his report. (Trustee's Memorandum in Opposition to PBGC's Motion for Summary Judgment at 18, n.12; Amenta Deposition at 60-61, 65-70, 71-72; Deposition Exhibits 8, 9).

The PBGC asserts that if constituent parties in the Chapter 11 proceeding thought the terminated plans were overfunded, the plans would have been voluntarily terminated and Debtors would have purchased close-out annuities to effect plan termination pursuant to 29 U.S.C. § 1341(b)(3)(A)(i). However, the Court does not agree with the PBGC's contention that the appropriate standard in determining whether the plans were adequately funded for purposes of allowing a claim in bankruptcy turns on whether the assets could have purchased close-out annuities prior to confirmation of Debtors' plan. Rather, it appears to the Court that the appropriate test is to match the asset value as of the termination date with the calculation of *guaranteed* benefit liabilities. The calculation of the liabilities in turn concerns the discount rate to be applied in calculating the present value of future benefit liabilities. The PBGC urges that the method to be used in calculating a plan's benefit liabilities and thus whether the plan is sufficiently funded is set forth in 29 C.F.R. pt. 4044, sub. pt. B. The Trustee urges use of the "reasonably prudent investor" or "portfolio" standard. Much has been written on the issue and it has been the subject of litigation across the country. *See; e.g.*, Daniel Keating,

Chapter 11's New Ten-Ton Monster: The PBGC and Bankruptcy, 77 MINN. L. REV. 803 (1993).

Upon consideration, the Court agrees with the views set forth in the opinion of Judge Dee Benson in *Pension Benefit Guar. Corp. v. Reorganized C F & I Fabricators of Utah, Inc., et al.*, No. 2:96 CV 202 B (D. Utah April 1, 1997). There, the PBGC appealed a decision of the bankruptcy court holding that the discount rate to be applied in calculating the present value of unfunded future pension benefit liabilities is the rate of return a prudent inventor would receive for investing the funds. The PBGC proposed instead that the appropriate rate was that promulgated by the agency's own regulations. On appeal, the District Court held that the PBGC's goal of making plan termination less attractive than the purchase of close-out annuities "is inconsistent with ascertaining the true present value of the unfunded claims." *Id.* at 5. The court concluded that applying the PBGC's proposed discount rate would permit the agency to "obtain a windfall at the expense of other similarly situated creditors" and held that the use of the prudent investor rate was the only rate that would satisfy the mandate of equality among creditors under the Bankruptcy Code. *Id.* at 7. Having said that, this Court agrees with the PBGC that there is a dispute of fact as to what is the appropriate rate and thus summary judgment is inappropriate until the Court ascertains after an evidentiary hearing what may be the appropriate rate to apply. However, it is this Court's finding that it shall be the prudent investor rate, not agency regulations, which will determine the agency's claim.

Subsequent to the filing of the motions for summary judgment, the United States Court of Appeals for this Circuit decided *Pension Benefit Guar. Corp. v. Sunarhauserman, Inc., et al. (In re Sunarhauserman, Inc., et al.)*, 126 F.3d 811 (6th Cir. (Ohio) 1997). The issue there was to determine what part of a claim for unpaid minimum funding contributions

accruing post-petition was entitled to administrative priority. The Court affirmed lower court decisions which limited administrative expense priority to that portion of a post-petition minimum funding contribution claim that was attributable to pension benefits actually earned by employees during a debtor's post-petitioned operations. Both the PBGC and the Trustee have communicated to the Court (not by pleading but by letter) their views regarding the Sixth Circuit's recent decision. Not surprisingly, the PBGC's view is that the decision is incorrect and more importantly is inapplicable to these proceedings. The Trustee, also not surprisingly, shares the opposite view. The Court's view is that the Sunarhauserman decision clearly expresses our Circuit Court's view on the issue. The Court thus concludes that with respect to the PBGC's Minimum Funding Claims, only that portion of the claims attributable to "normal costs" actually earned by employees during Debtors' post-petition operations is entitled to an administrative priority under 11 U.S.C. § 507.

CONCLUSION

The PBGC seeks a ruling that Minimum Funding Claims which may have accrued post-petition are to be treated as taxes and entitled to priority under Title 11. The Trustee seeks a ruling that the PBGC has no Unfunded Benefit Claims because all plans were overfunded on the date of termination; that there are no Minimum Funding Claims because there are no Unfunded Benefit Claims; that if there are Unfunded Benefit Claims and Minimum Funding Claims, that the former should be reduced dollar for dollar by the allowed amount of any Minimum Funding Claims; and that if the Court finds that there are Minimum Funding Claims, only that portion of the claims attributable to "normal costs" should be entitled to a priority under § 507.

The Court's views on those issues are set forth herein. Not all issues are hereby resolved. However, this narrows the

issues to be resolved. A further status conference shall be set by the Clerk to determine how to proceed with resolution of remaining issues.

An appropriate order shall enter.

/s/ William T. Bodoh
WILLIAM T. BODOH
United States Bankruptcy Judge

APPENDIX B

[Filed Dec. 8, 1998]

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
Chapter 11

CASE NOS. 93-41898 and 93-41899

In re: CSC INDUSTRIES INC.
and COPPERWELD STEEL COMPANY,
Debtors.

KATHRYN A. BELFANCE, Trustee of the
Copperweld Steel Company Liquidation Trust,
Plaintiff,

v.

PENSION BENEFIT GUARANTY CORPORATION,
Defendant.

ADVERSARY NUMBER 95-4103

JUDGMENT

In accordance with this Court's Memorandum Opinion entered on December 3, 1997, and the Stipulations dated July 19, 1996, January 7, 1997 and December 2, 1998, this Court's having approved the parties' *Partial Settlement Agreement*, it is hereby ORDERED, ADJUDGED and DECREED as follows:

A. The Pension Benefit Guaranty Corporation ("PBGC") is hereby allowed an unsecured claim of $1,870,481.00 entitled to treatment as an administrative expense under Sections 503(b)(1)(A) and 507(a)(1) of Title 11, United States Code, representing the portion of the PBGC's claim for the unpaid minimum funding contributions for the P&M Plan constituting "normal

cost" for post-petition periods from November 22, 1993 through and including October 11, 1995. The remainder of the PBGC's minimum funding contribution claim is denied priority under Sections 503(b)(1)(B) and 507(a)(1) or 507(a)(8) of Title 11, United States Code and is hereby disallowed; and

B. The PBGC is hereby allowed general unsecured claims totaling $1,822,075.19 for the unfunded benefit liabilities of the P&M Plan, the Salaried Plan and Guard's Plan entitled to treatment as Class 5B Allowed Claims pursuant to the Second Amended Joint Plan of Reorganization of CSC Industries, Inc. and Copperweld Steel Company confirmed by this Court on September 30, 1995. The remainder of the PBGC's unfunded benefit liabilities claims are hereby disallowed; and

C. The PBGC is hereby allowed a general unsecured claim of $68,980.33 for the unpaid premiums owed to the PBGC entitled to treatment as a Class 5B Allowed Claim pursuant to the Second Amended Joint Plan of Reorganization of CSC Industries, Inc. and Copperweld Steel Company confirmed by this Court on September 30, 1995; and

D. Count V of the Complaint, seeking equitable subordination of the claims of the PBGC, has been withdrawn with prejudice by agreement of the parties and is no longer at issue.

The Court finds that this Judgment resolves all matters at issue between the Trustee and the PBGC in this Adversary Proceeding, and is a final appealable judgment, and that there is no just cause for delay. Each party to this Adversary Proceeding shall bear its own costs.

IT IS SO ORDERED.

/s/ William T. Bodoh
Bankruptcy Judge William T. Bodoh

APPENDIX C

[Filed Aug. 10, 1999]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT COURT OF OHIO

CASE NO. 4:99CV41

In re: CSC INDUSTRIES, INC.
& COPPERWELD STEEL COMPANY,

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

KATHRYN A. BELFANCE, Trustee of the
Copperweld Steel Company Liquidation Trust,
Appellee.

MEMORANDUM OPINION

This matter is an Appeal from final judgment[1] of the United States Bankruptcy Court for the Northern District of Ohio entered on December 8, 1998, in Case Nos. 93-41898, 93-41899, Adv. Pr. No. 95-4103(Dkt. #63-1).

The two issues on appeal are:

1) Whether the entire amount of the claim of Copperweld Steel Company Pension Plan for Production and Maintenance Employees ("the P&M Plan") for

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[1] The December 8, 1997 judgment was filed in accordance with the Bankruptcy Court's Memoramdum Opinion entered on December 3, 1997 ("December 3rd opinion"), and the Stipulations dated July 19, 1996, January 7, 1997 and December 2, 1998.

unpaid minimum funding contributions ("unpaid contributions") in excess of $1,000,000 is entitled to administrative or priority treatment as a tax under provisions of the Internal Revenue Code, the Employee Retirement Income Security Act and the Bankruptcy Code.

2) Whether the amount of the PBGC's Unfunded Benefit Liability ("UBL") claims should be calculated using assumptions set forth in the PBGC regulations instead of a "reasonably prudent investor" rate.

This Court has jurisdiction pursuant to 28 U.S.C. § 158(a). The Court reviews the Bankruptcy Court's findings of fact using the clearly erroneous standard and its conclusions of law *de novo*. *Industrial Equipment Co. v. Emerson Electric Co.*, 554 F.2d 276 (6th Cir. 1977).

Pension Benefit Guaranty Corporation ("PBGC" or "the agency") is a wholly-owned United States government corporation, created under Title IV of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 *et seq.* ("ERISA"). 29 U.S.C. § 1302(d) (1989). PBGC administers the federal insurance program for ERISA pension benefit plans, and is charged with: (i) encouraging the continuation of private pension plans; (ii) providing for the payment of pension benefits to participants of terminated plans; and (iii) minimizing termination insurance premiums. 29 U.S.C. § 1302(a) (1989).

Unpaid Contributions

In its December 3rd opinion, the Bankruptcy Court held that this issue was governed by the Sixth Circuit's holding in *In re: Sunarhauserman*, 126 F.3d 811 (6th Cir. 1997)("The Court thus concludes that with respect to the PBGC's Minimum Funding Claims, only that portion of their claims attributable to "normal costs" actually earned by employees during Debtor's post-petition operations is entitled to an

administrative priority under 11 U.S.C. § 507"). However, PBGC argues that the Bankruptcy Court failed to address its contention that the unpaid contributions deserve priority tax treatment.

PBGC contends that the unpaid contributions at issue are entitled to priority as a tax under 26 U.S.C. § 412(n)(1). 26 U.S.C. § 412(n)(1) states, in pertinent part:

> . . .if–
>
> (A) any person fails to make a required installment under subsection (m) or any other payment required under this section before the due date for such installment or other payment, and
>
> (B) the unpaid balance of such installment or other payment (including interest), when added to the aggregate unpaid balance of all preceding such installments or other payments for which payment was not made before the due date (including interest), exceeds $1,000,000,

then there shall be a lien in favor or the plan in the amount . . . upon all property and rights to property, whether real or personal. . . .

26 U.S.C. § 412 (1997).

26 U.S.C. § 412(n)(4) adds, in pertinent part:

> (B). . . The lien imposed by paragraph (1) shall arise on the 60th day following the due date for the required installment. . . .
>
> (C). . . Any amount with respect to which a lien is imposed under paragraph (1) shall be treated as taxes due and owing the United States and rules similar to the rules of subsections (c), (d) and (e) of section 4068 of [ERISA] shall apply with respect to a lien imposed by subsection (a) and the amount with respect to such lien.

Id.

"[C]haracterizations in the Internal Revenue Code are not dispositive in the bankruptcy context." *United States v. Reorganized CF&I Fabricators, Inc.*, 518 U.S. 213 (1996). "In every case in which the Court considered whether a particular exaction called a 'tax' in the statute creating it was a tax for bankruptcy purposes, the Court looked behind the label and rested its answer directly on the operation of the provision." *Id.*" (citing *United States v. New York*, 315 U.S. 510, 514-17 (1942)).

In order to determine whether Congress intended an exaction to be given tax treatment in the bankruptcy context, the Court first looks for some "explicit connection between" the IRC provision and the Bankruptcy Code. *Id.* at 213. If the Court does not find a link, the Court then must "look behind the label placed on the exaction" and conduct a "functional examination" of the provision in question to determine whether it was a "'pecuniary burden laid upon individuals or property for the purpose of supporting the Government.' " *Id.* (quoting *New Jersey v. Anderson*, 203 U.S. 483, 492 (1906)). [2]

This Court is persuaded by the analysis and reasoning of the Tenth Circuit on this issue In re CF& I Fabricators of Utah, Inc. 150 F.3d 1293 (10th Cir. 1998). After examining the ERISA provisions, the Tenth Circuit concluded that there

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[2] The four factors for determining whether contributions required of a debtor are entitled tax priority in bankruptcy are:

> 1. An involuntary, pecuniary burden, regardless of name, laid upon the individual or property;
>
> 2. Imposed by, or under authority of the legislature;
>
> 3. For public purposes, including the purposes of defraying expenses of government or undertakings authorized by it;
>
> 4. Under the police or taxing power of the state.

In re CF&I Fabricators of Utah, Inc., 150 F.3d at 1298 (*quoting In re Chateaugay Corp.*, 52 F.3d 478 (2d Cir. 1995)).

is no expressed congressional intent that the "tax treatment" described in § 412 was meant to apply in the bankruptcy context. *Id.* at 1297 ("[E]ven though ERISA tangentially refers to 'a case under Title 11 or in insolvency proceedings,' . . .Congress made no specific reference in 11 U.S.C. § 507(a)(7) to 26 U.S.C. § 412(n)(4)").

Furthermore, applying the functional analysis test, this Court finds that the unpaid contributions in the case *sub judice* fail the third element of the *Chateaugay* test. "[T]he object of the contributions is not to defray the expenses of the government or any governmental undertaking, but rather, is to finance private obligation." *CF&I*, 150 F.3d at 1298. Although mandated by statute, there is simply no credible argument that the unpaid contributions will fund a function of the United States or any of its undertakings.

Having concluded that the unpaid contributions are not entitled to priority as a tax under 26 U.S.C. § 412(n)(1), this Court agrees with the Bankruptcy Court's find that *Sunarhauserman* governs the unpaid contributions, and that only that portion of the claims attributable to "normal costs" actually earned by employees during Debtor's post-petition operations is entitled to administrative priority.

UBL claims

PBGC in its Brief for Appellant (Dkt. #7) states, "[T]his month PBGC filed a petition for certiorari with the Supreme Court on . . . an issue identical to [the UBL claims] presented here" and cites to *PBGC v. Reorganized CF&I Fabricators of Utah, Inc.*, No. 98-1440 (petition filed March 10, 1999)." Brief for Appellant at p. 14. In fact, the Supreme Court denied certiorari by *Pension Ben. Guaranty Corp. v. CF&I Fabricators of Utah, Inc.*, 119 S. Ct. 2020 (U.S. June 1, 1999)(No. 98-1440). Furthermore, this Court again adopts the sound reasoning of the Tenth Circuit in *In re CF&I Fabricators of Utah, Inc., supra.*, and concludes that the

Bankruptcy Court did not err in applying the prudent investor rate, rather than the agency rate, to determine the UBL claims.

To insure the relative equality of payment between claims that mature in the future and claims can be paid on the date of bankruptcy, the Bankruptcy Code mandates that all claims for future payments must be reduced to present value. 11 U.S.C. § 50299(b)("[T]he court . . . shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition. . . ."). Accepting the need to discount the amount of the claim, the parties disagree only over the approach to valuation.

PBGC relies on two ERISA provisions, which PBGC argues grant authority to the agency to create regulations governing valuation of the UBL claims in the case *sub judice*. PBGC argues that its regulations are not arbitrary nor capricious, and, therefore, the Bankruptcy Court is bound to value the UBL claims pursuant to the PBGC regulations[3].

The first, 29 U.S.C. § 1362(b)(1)(A), provides, in pertinent part, "[L]iability to [PBGC] shall be the total amount of the unfunded benefit liabilities (as of the termination date) to all participants and beneficiaries under the plan. . . ." 29 U.S.C. § 1362 (1989).

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[3] ERISA mandates that the value of benefit liabilities be determined "on the basis of assumptions prescribed by [PBGC]." 29 U.S.C. § 1301(a)(18)(A). PBGC prescribed such assumptions in the final regulation issued in 1981, and revised them in 1993, without changing the basic method. 29 C.F.R. pt. 2619 (recodified at 29 C.F.R. §§ 4044.41-.75 (1998)). The regulations produces a value of benefit liabilities that replicates the market price of insurance company annuity contracts. 58 Fed. Reg. 5128 (Jan. 19, 1993). It does so using linked assumptions about mortality, expected retirement age, and interest. *Id.* The interest factor is periodically adjusted to reflect changes in insurance industry prices. 58 Fed. Reg. 50,182, 50,815 (Sept. 28, 1993). This method results in a value equivalent to their value in the market place.

The second, 29 U.S.C. § 1301(a)(18), defines the "amount of [UBL claims] as: the excess (if any) of–

> (A) the value of the benefit liabilities under the plan (determined as of such date on the basis of assumptions prescribed by [PBGC] for the purposes of section 1344 of this title), over
>
> (B) the current value (as of such date) of the assets of the plan.

29 U.S.C. § 1301(a)(18) (1994).

PBGC maintains this combination of statutes represents an express delegation of rule-making power to PBGC to determine the present value of its claims for terminated plans.

Although PBGC's valuation method is valid in other contexts[4], this Court concludes that it is not the appropriate valuation method in Bankruptcy Court. First, 29 U.S.C. § 1301(a)(18) defines the amount of UBL claims "for the purposes of this title [ERISA]" only. 29 U.S.C. § 1301(19). Second, 29 U.S.C. § 1301(a)(18) conflicts with provisions of the Bankruptcy Code. "Congress has provided very precise contours of how claims that are administered in Chapter 11 are to be decided, and has pronounced as a cardinal rule that all claims within the same class must be treated alike.

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[4] A sponsor may terminate a plan in a "standard" termination if the plan is fully funded, i.e., it has sufficient assets to cover the future benefits of all participants and their beneficiaries. 29 U.S.C. § 1341(b). A sponsor may terminate an underfunded plan only if the sponsor and each member of its controlling group demonstrate that they are in financial "distress." 29 U.S.C. § 1341(c). PBGC is obligated to terminate a plan "involuntarily" if the plan runs out of money to pay benefits currently due. 29 U.S.C. § 1342(a). PBGC may also terminate a plan involuntarily if it determines that the plan will be unable to pay future benefits when due, the sponsor has failed to pay the statutory minimum funding contributions, or the risk of long-run loss to the insurance program may increase unreasonably if the plan is not terminated. *Id.*

11 U.S.C. § 1123(a)(4)(1994)." *In re CF&I Fabricators of Utah, Inc.*, 150 F.3d 1301. That principle would be violated here if PBGC's interpretation of § 1301(a)(18) were adopted because PBGC's discount rate would apply only to it and not any other general unsecured creditors. Congress has made clear when ERISA conflicts with another provision of federal law, ERISA must be subordinated. 29 U.S.C. § 1144(d) (1998)("Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supercede any law of the United States (except as provided in section 1031 and 1137(c) of this title) or any rule or regulation issued under any such law").

"Nothing in the ERISA sections relied upon by PBGC implies a carry-over into the realm of bankruptcy to allow PBGC to set its own valuation methodology." *In re CF&I Fabricators of Utah, Inc.*, 150 F.3d at 1301. In spite of the fact that the methodology was adopted in the exercise of PBGC's administrative authority, this Court finds that it is inapplicable in the context of bankruptcy.

Having concluded that the Bankruptcy Court did not err in its conclusions with respect to the two issues on appeal, the Judgment of the Bankruptcy Court issued on December 7, 1998 (Dkt. #63-1) is hereby AFFIRMED.

IT IS SO ORDERED.

/s/ Peter C. Economus
PETER C. ECONOMUS
United States District Judge

APPENDIX D

[Filed Nov. 17, 2000]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-4243

In re: CSC INDUSTRIES, INC. &
COPPERWELD STEEL COMPANY,
Debtors.

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

KATHRYN A. BELFANCE, Trustee, the
Copperweld Steel Company Liquidation Trust,
Appellee.

Appeal from the United States District Court
for the Northern District of Ohio at Youngstown.
No. 99-00041. Peter C. Economus, District Judge.

JUDGES: Before: JONES, RYAN, and CLAY, *Circuit Judges.*

RYAN, Circuit Judge. We must decide in this appeal whether the lower courts erred in using a "prudent investor rate" to calculate a claim in a bankruptcy proceeding involving unfunded benefit liabilities for a defined benefit pension plan (DBPP) under the Employee Retirement Income Security Act of 1974 (ERISA). We must also determine whether a claim for missed minimum funding contributions is entitled to a "tax" priority under 11 U.S.C. § 507(a)(7) (currently § 507(a)(8)). We hold that the "prudent investor rate" is an appropriate valuation tool for a claim involving

unfunded benefit liabilities in the bankruptcy context. We also hold that a claim for missed minimum funding contributions is not entitled to a section 507(a)(7) "tax" status when a lien has not been imposed under 26 U.S.C. § 412(n)(4), due to the operation of the automatic stay, 11 U.S.C. § 362(a)(4), triggered by a Chapter 11 filing in bankruptcy court. We must, therefore, affirm.

I.

Under ERISA, employers are required to (1) pre-fund DBPPs by making an annual minimum funding contribution, which is the calculated present value of predicted future pension obligations incurred due to the participants' employment for that year, plus any past service obligations; and (2) insure the DBPPs with the Pension Benefit Guaranty Corporation (PBGC), a private governmental insurance corporation created under ERISA. *See* 29 U.S.C. §§ 1082, 1302. If a DBPP is terminated, the PBGC is required to pay benefits to beneficiaries of the DBPPs as they become due, even if the assets of the terminated plan are insufficient to cover such payments. The PBGC has a claim against the employer for any unfunded benefit liabilities it is forced to pay. An unfunded benefit liability is defined as the difference between the present value of the predicted future liabilities of the plan and the present value of the plan's assets. *See* 29 U.S.C. § 1301(a)(18).

The present case arose after the Copperweld Steel Company began missing its minimum funding contributions for three of its DBPPs in July 1993. Copperweld filed a Chapter 11 petition in bankruptcy court on November 22, 1993, in order to reorganize under the Bankruptcy Code. The PBGC filed an action in federal district court seeking involuntary termination of the three DBPPs, but the parties settled the action and the DBPPs were voluntarily terminated and the PBGC became the trustee of the DBPPs. At the time

the DBPPs were terminated, the missed minimum funding contributions totaled $8,813,046.

Kathryn A. Belfance, the Chapter 11 trustee for Copperweld, initiated an action in bankruptcy court because of the disagreement over both the amount and the priority of the PBGC's claim. Both parties moved for summary judgment on both issues. The bankruptcy court granted summary judgment in favor of Belfance on most, but not all, of the issues in the case.

In order for all of Copperweld's debt to be dealt with under a Chapter 11 reorganization plan, it was necessary to reduce all of its liabilities to present value. The PBGC argued that the present value of its unfunded benefit liability claim was $49,658,702.19, using an investment return rate of 6.4% for the first 20 years and 5.75% thereafter. The bankruptcy court held that the investment return rates the PBGC used in determining the present value of the unfunded benefit liabilities would give the PBGC a "windfall," and elected to apply a "prudent investor rate," that which a reasonably prudent investor would receive from investing the funds. The parties stipulated a "prudent investor rate" would be a 10% return, resulting in a claim in the amount of $1,822,075.19.

The bankruptcy court also held that the portion of the missed minimum funding contributions attributable to normal costs was entitled to an "administrative" priority under 11 U.S.C. § 503(b)(1)(A), pursuant to this court's decision in *Pension Benefit Guaranty Corp. v. Sunarhauserman, Inc.*, 126 F.3d 811 (6th Cir. 1997). The parties stipulated that $1,870,481 of the missed minimum funding contributions could be attributed to normal costs.

The PBGC appealed the bankruptcy court's order to the federal district court. The district court affirmed the bankruptcy court's judgment and concluded that no portion of the missed minimum funding contribution claim was entitled

to priority as a "tax" under the Bankruptcy Code. The appeal to this court followed.

II.

In an appeal from a bankruptcy court, we review the bankruptcy court's findings of fact for clear error and the district court's legal conclusions de novo. *See In re Highland Superstores, Inc.*, 154 F.3d 573, 576 (6th Cir. 1998). In this case all issues of fact were stipulated by the parties, so only legal conclusions are under review.

III.

We consider initially whether the courts below erred in determining that the "prudent investor rate" was the appropriate valuation tool for calculating the present value of the claim for unfunded benefit liabilities. We conclude that they did not.

Under 11 U.S.C. § 502(b), the bankruptcy court must, upon objection to a claim, "determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition." Therefore, the bankruptcy court must value present claims and reduce claims for future payment to present value, while also keeping in mind that a fundamental objective of the Bankruptcy Code is to treat similarly situated creditors equally. *See* 11 U.S.C. § 1123(a)(4). In order for the PBGC's claim to receive preferential treatment in a bankruptcy proceeding, there must be a clear authorization for such treatment from Congress. *See In re White Motor Corp.*, 831 F.2d 106, 110 (6th Cir. 1987).

The PBGC's claim arises under 29 U.S.C. § 1362(b)(1)(A), which provides, in pertinent part: "Liability to the [PBGC] . . . shall be the total amount of the unfunded benefit liabilities (as of the termination date) to all participants and beneficiaries under the plan." The amount of the unfunded benefit liabilities is defined as:

the excess (if any) of—

(A) the value of the benefit liabilities under the plan (determined as of such date on the basis of assumptions prescribed by the [PBGC] for purposes of section 1344 of this title), over

(B) the current value (as of such date) of the assets of the plan.

29 U.S.C. § 1301(a)(18).

The PBGC argues that section 1301(a)(18) constitutes an explicit delegation of rulemaking authority that allows it to prescribe the assumptions used to value a terminated pension plan's unfunded benefit liabilities. The PBGC further argues that the valuation assumptions in its regulations are reasonable because they are calculated to replicate the market price of annuities sold by private insurance companies, and when employers terminate fully funded DBPPs voluntarily they are required to purchase annuities to cover the lifetime benefits of plan beneficiaries. *See* 29 C.F.R. §§ 2617.28, 2619 (recodified at 29 C.F.R. § 4041-4044 (1999)).

Belfance argues that the regulations the PBGC is relying on use exceptionally low interest rates in order to discourage employers from voluntarily terminating viable DBPPs; therefore, the regulations are inapplicable within a bankruptcy context when the employer is in financial distress. Furthermore, because the ERISA provision at issue, 29 U.S.C. § 1301(a)(18), conflicts with the Bankruptcy Code's mandate that same-class creditors be treated equally, 11 U.S.C. § 1123(a)(4), the ERISA provision must be subordinated.

This same issue was recently considered by the Tenth Circuit in *Pension Benefit Guaranty Corp. v. CF&I Fabricators of Utah, Inc.*, 150 F.3d 1293 (10th Cir. 1998), *cert. denied*, 526 U.S. 1145, 119 S. Ct. 2020, 143 L. Ed. 2d 1032 (1999). The *CF&I* court concluded that nothing in

ERISA prevents the valuation of an unfunded benefit liability claim using the "prudent investor rate." *See id.* 150 F.3d at 1301. To reach this conclusion, the *CF&I* court stated:

> 29 U.S.C. § 1301(a)(18) conflicts with provisions of the Bankruptcy Code, and, as the district court held, this conflict must be controlled by the Bankruptcy Code. Indeed, the very action in which the claim arises is, after all, bankruptcy. Congress has provided very precise contours of how claims that are administered in Chapter 11 are to be decided, and has pronounced as a cardinal rule that all claims within the same class must be treated alike. 11 U.S.C. § 1123(a)(4). That principle would be violated here if PBGC's interpretation of § 1301(a)(18) were adopted because PBGC's discount rate would apply only to it and not any other general unsecured creditor. Congress has made clear when ERISA conflicts with another provision of federal law, ERISA must be subordinated. 29 U.S.C. § 1144(d).

Id.

We are not entirely persuaded that the district and *CF&I* courts were correct in concluding that 29 U.S.C. § 1144(d), which provides that "nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States," requires that the ERISA provision, 29 U.S.C. § 1301(a)(18), be subordinated to the Bankruptcy Code. Section 1144(d), on its face, applies only to subchapter I of ERISA, whereas the definition of unfunded benefit liabilities, section 1301(a)(18), is found in subchapter III of ERISA.

However, we believe that the bankruptcy court's authority under 11 U.S.C. §§ 502(b) and 1123(a)(4) to determine the amount of claims in bankruptcy proceedings and treat creditors in the same class equally gives it the authority to value unfunded benefit liabilities claims using a "prudent investor rate." In *Raleigh v. Illinois Department of Revenue*,

530 U.S. 15, 120 S. Ct. 1951, 1957, 147 L. Ed. 2d 13 (2000), the Supreme Court recently reiterated the principle that the validity of a claim is governed by nonbankruptcy law. While the *validity* of a claim might be a matter for nonbankruptcy law, bankruptcy courts have the statutory authority to determine the *allowability* and *amount* of the claim.

The PBGC's authority to promulgate regulations governing the valuation of unfunded benefit liabilities does not extend so far as to subordinate the authority of the bankruptcy courts to value claims in bankruptcy proceedings. In this case, the PBGC should be treated like any other unsecured creditor in the bankruptcy reorganization; therefore, the use of the "prudent investor rate" to value the PBGC's claim was appropriate.

IV.

We next address the PBGC's contention that the missed minimum funding contributions in excess of $1 million are entitled to a "tax" priority under 11 U.S.C. § 507(a)(7) (current version at 11 U.S.C. § 507(a)(8)), due to a statutory lien imposed pursuant to 26 U.S.C. § 412(n).

Section 412(n)(1)(B) provides that there shall be a lien in favor of the plan when the total amount unpaid and overdue exceeds $1 million. Furthermore, 26 U.S.C. § 412(n)(4), as it existed in 1993, states in pertinent part:

> (B) Period of lien.
>
> The lien *imposed . . . shall arise on the 60th day following the due date* for the required installment . . . .
>
> (C) Certain rules to apply
>
> *Any amount with respect to which a lien is imposed* . . . shall be *treated as taxes* due and owing the United States . . . .

26 U.S.C. § 412(n)(4) (emphasis added).

The district court thought it was necessary to examine the interplay between the ERISA and Bankruptcy Code provisions involved in order to determine whether Congress intended the "tax" in section 412(n)(4) to be given tax treatment in the bankruptcy context. The court first looked for an "explicit connection" between section 412(n) in ERISA and the Bankruptcy Code. Finding no "connector" between the statutes, the court then performed a "functional examination" to determine the nature of the "tax" in section 412(n) and concluded that the missed funding contributions were not entitled to priority as a "tax" under section 507(a)(7) in the Bankruptcy Code because the true nature of the tax at issue was not to fund a function of the United States.

We agree with the district court's conclusion that the claim was not entitled to a "tax" priority in the bankruptcy context, but do not think it was necessary to examine the interrelationship between ERISA and the Bankruptcy Code in this case. The plain language of section 412(n)(4)(C) requires only the amount to which a "*lien is imposed* . . . [to] be *treated as taxes*." (Emphasis added.) According to facts stipulated by the parties, the lien imposed by section 412(n)(4) would have arisen 60 days following January 15, 1994 (the date upon which missed minimum funding contributions exceeded $1 million). However, Copperweld had already filed for Chapter 11 reorganization on November 22, 1993, triggering an automatic stay which prevented "any act to create, perfect, or enforce any lien against property of the estate." 11 U.S.C. § 362(a)(4).

We hold that because a lien was never imposed on the missed minimum funding contributions pursuant to 26 U.S.C. § 412(n)(4), the PBGC's claim cannot be treated as a tax and, therefore, does not warrant a priority status under 11 U.S.C. § 507(a)(7).

V.

For the foregoing reasons, the district court order affirming the bankruptcy court is AFFIRMED.

APPENDIX E

[Filed January 30, 2001]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

99-4242

In re: CSC INDUSTRIES, INC. &
COPPERWELD STEEL COMPANY,
Debtors.

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

KATHRYN A. BELFANCE, Trustee, the
Copperweld Steel Company Liquidation Trust,
Appellee.

ORDER

BEFORE: JONES, RYAN, and CLAY, *Circuit Judges*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX F

STATUTORY PROVISIONS

All 29 U.S.C. citations are to the 1994 edition of United States Code.

29 U.S.C. § 1301

§ 1301. Definitions

(a) For purposes of this subchapter, the term—

(1) "administrator" means the person or persons described in paragraph (16) of section 1002 of this title;

(2) "substantial employer", for any plan year of a single-employer plan, means one or more persons—

(A) who are contributing sponsors of the plan in such plan year,

(B) who, at any time during such plan year, are members of the same controlled group, and

(C) whose required contributions to the plan for each plan year constituting one of—

(i) the two immediately preceding plan years, or

(ii) the first two of the three immediately preceding plan years,

total an amount greater than or equal to 10 percent of all contributions required to be paid to or under the plan for such plan year;

(3) "multiemployer plan" means a plan—

(A) to which more than one employer is required to contribute,

(B) which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer, and

(C) which satisfies such other requirements as the Secretary of Labor may prescribe by regulation,

except that, in applying this paragraph—

(i) a plan shall be considered a multiemployer plan on and after its termination date if the plan was a multiemployer plan under this paragraph for the plan year preceding such termination, and

(ii) for any plan year which began before September 26, 1980, the term "multiemployer plan" means a plan described in section 414(f) of title 26 as in effect immediately before such date;

(4) "corporation", except where the context clearly requires otherwise, means the Pension Benefit Guaranty Corporation established under section 1302 of this title;

(5) "fund" means the appropriate fund established under section 1305 of this title;

(6) "basic benefits" means benefits guaranteed under section 1322 of this title (other than under section 1322(c) [footnote omitted] of this title), or under section 1322a of this title (other than under section 1322a(g) of this title);

(7) "non-basic benefits" means benefits guaranteed under section 1322(c) [footnote omitted] of this title or 1322a(g) of this title;

(8) "nonforfeitable benefit" means, with respect to a plan, a benefit for which a participant has satisfied the conditions for entitlement under the plan or the requirements of this chapter (other than submission of a formal application, retirement, completion of a required waiting period, or death in the case of a benefit which returns all or a portion of a participant's accumulated mandatory employee contributions upon the participant's death), whether or not the benefit may subsequently be reduced or suspended by a plan amendment, an occurrence

of any condition, or operation of this chapter or the Internal Revenue Code of 1986;

(9) "reorganization index" means the amount determined under section 1421(b) of this title;

(10) "plan sponsor" means, with respect to a multiemployer plan—

(A) the plan's joint board of trustees, or

(B) if the plan has no joint board of trustees, the plan administrator;

(11) "contribution base unit" means a unit with respect to which an employer has an obligation to contribute under a multiemployer plan, as defined in regulations prescribed by the Secretary of the Treasury;

(12) "outstanding claim for withdrawal liability" means a plan's claim for the unpaid balance of the liability determined under part 1 of subtitle E of this subchapter for which demand has been made, valued in accordance with regulations prescribed by the corporation;

(13) "contributing sponsor", of a single-employer plan, means a person described in section 1082(c)(11)(A) of this title (without regard to section 1082(c)(11)(B) of this title) or section 412(c)(11)(A) of title 26 (without regard to section 412(c)(11)(B) of such title).[1]

(14) "in the case of a single-employer plan—

(A) "controlled group" means, in connection with any person, a group consisting of such person and all other persons under common control with such person;

(B) the determination of whether two or more persons are under "common control" shall be made under regulations of the corporation which are consistent

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[1] So in original. The period probably should be a semicolon.

and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under subsections (b) and (c) of section 414 of title 26; and

(C)(i) notwithstanding any other provision of this subchapter, during any period in which an individual possesses, directly or indirectly, the power to direct or cause the direction of the management and policies of an affected air carrier of which he was an accountable owner, whether through the ownership of voting securities, by contract, or otherwise, the affected air carrier shall be considered to be under common control not only with those persons described in subparagraph (B), but also with all related persons; and

(ii) for purposes of this subparagraph, the term—

(I) "affected air carrier" means an air carrier, as defined in section 40102(a)(2) of title 49, that holds a certificate of public convenience and necessity under section 41102 of title 49 for route number 147, as of November 12, 1991;

(II) "related person" means any person which was under common control (as determined under subparagraph (B)) with an affected air carrier on October 10, 1991, or any successor to such related person;

(III) "accountable owner" means any individual who on October 10, 1991, owned directly or indirectly through the application of section 318 of title 26 more than 50 percent of the total voting power of the stock of an affected air carrier;

(IV) "successor" means any person that acquires, directly or indirectly through the application of section 318 of title 26, more than 50 percent of the total voting power of the stock

of a related person, more than 50 percent of the total value of the securities (as defined in section 1002(20) of this title) of the related person, more than 50 percent of the total value of the assets of the related person, or any person into which such related person shall be merged or consolidated; and

(V) "individual" means a living human being;

(15) "single-employer plan" means any defined benefit plan (as defined in section 1002(35) of this title) which is not a multiemployer plan;

(16) "benefit liabilities" means the benefits of employees and their beneficiaries under the plan (within the meaning of section 401(a)(2) of title 26);

(17) "amount of unfunded guaranteed benefits", of a participant or beneficiary as of any date under a single-employer plan, means an amount equal to the excess of—

(A) the actuarial present value (determined as of such date on the basis of assumptions prescribed by the corporation for purposes of section 1344 of this title) of the benefits of the participant or beneficiary under the plan which are guaranteed under section 1322 of this title, over

(B) the current value (as of such date) of the assets of the plan which are required to be allocated to those benefits under section 1344 of this title;

(18) "amount of unfunded benefit liabilities" means, as of any date, the excess (if any) of—

(A) the value of the benefit liabilities under the plan (determined as of such date on the basis of assumptions prescribed by the corporation for purposes of section 1344 of this title), over

(B) the current value (as of such date) of the assets of the plan;

(19) "outstanding amount of benefit liabilities" means, with respect to any plan, the excess (if any) of—

(A) the value of the benefit liabilities under the plan (determined as of the termination date on the basis of assumptions prescribed by the corporation for purposes of section 1344 of this title), over

(B) the value of the benefit liabilities which would be so determined by only taking into account benefits which are guaranteed under section 1322 of this title or to which assets of the plan are allocated under section 1344 of this title; (20) "person" has the meaning set forth in section 1002(9) of this title;

(20) "person" has the meaning set forth in section 1002(9) of this title;

(21) "affected party" means, with respect to a plan—

(A) each participant in the plan,

(B) each beneficiary under the plan who is a beneficiary of a deceased participant or who is an alternate payee (within the meaning of section 1056(d)(3)(K) of this title) under an applicable qualified domestic relations order (within the meaning of section 1056(d)(3)(B)(i) of this title),

(C) each employee organization representing participants in the plan, and

(D) the corporation,

except that, in connection with any notice required to be provided to the affected party, if an affected party has designated, in writing, a person to receive such notice on behalf of the affected party, any reference to the affected party shall be construed to refer to such person.

(b)(1) An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of title 26. For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades or businesses as a single employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the Treasury under section 414(c) of title 26.

(2) For purposes of subtitle E of this subchapter—

(A) except as otherwise provided in subtitle E of this subchapter, contributions or other payments shall be considered made under a plan for a plan year if they are made within the period prescribed under section 412(c)(10) of title 26 (determined, in the case of a terminated plan, as if the plan had continued beyond the termination date), and

(B) the term "Secretary of the Treasury" means the Secretary of the Treasury or such Secretary's delegate.

29 U.S.C. § 1362

§ 1362. Liability for termination of single-employer plans under a distress termination or a termination by corporation

(a) In general

In any case in which a single-employer plan is terminated in a distress termination under section 1341(c) of this title or a termination otherwise instituted by the corporation under section 1342 of this title, any person who is, on the termination date, a contributing sponsor of the plan or a member of such a contributing sponsor's controlled group shall incur liability under this section. The liability under this section of all such persons shall be joint and several. The liability under this section consists of—

(1) liability of the corporation, to the extent provided in subsection (b) of this section, and

(2) liability to the trustee appointed under subsection (b) or (c) of section 1342 of this title, to the extent provided in subsection (c) of this section.

(b) Liability to corporation

(1) Amount of liability

(A) In general

Except as provided in subparagraph (B), the liability to the corporation of a person described in subsection (a) of this section shall be the total amount of the unfunded benefit liabilities (as of the termination date) to all participants and beneficiaries under the plan, together with interest (at a reasonable rate) calculated from the termination date in accordance with regulations prescribed by the corporation.

(B) Special rule in case of subsequent insufficiency

For purposes of subparagraph (A), in any case described in section 1341(c)(3)(C)(ii) of this title, actuarial present values shall be determined as of the date of the notice to the corporation (or the finding by the corporation) described in such section.

(2) Payment of liability

(A) In general

Except as provided in subparagraph (B), the liability to the corporation under this subsection shall be due and payable to the corporation as of the termination date, in cash or securities acceptable to the corporation.

(B) Special rule

Payment of so much of the liability under paragraph (1)(A) as exceeds 30 percent of the collective net worth of all persons described in subsection (a) of this section (including interest) shall be made under commercially reasonable terms prescribed by the corporation. The parties involved shall make a reasonable effort to reach agreement on such commercially reasonable terms. Any such terms prescribed by the corporation shall provide for deferral of 50 percent of any amount of liability otherwise payable for any year under this subparagraph if a person subject to such liability demonstrates to the satisfaction of the corporation that no person subject to such liability has any individual pre-tax profits for such person's fiscal year ending during such year.

(3) Alternative arrangements

The corporation and any person liable under this section may agree to alternative arrangements for the satisfaction of liability to the corporation under this subsection.

(c) Liability to section 1342 trustee

A person described in subsection (a) of this section shall be subject to liability under this subsection to the trustee appointed under subsection (b) or (c) of section 1342 of this title. The liability of such person under this subsection shall consist of—

(1) the outstanding balance of the accumulated funding deficiencies (within the meaning of section 1082(a)(2) of this title and section 412(a) of title 26) of the plan (if any) (which, for purposes of this subparagraph, shall include the amount of any increase in such accumulated funding deficiencies of the plan which would result if all pending applications for waivers of the minimum funding standard under section 1083 of this title or section 412(d) of title 26 and for extensions of the amortization period under section 1084 of this title or section 412(e) of title 26 with respect to such plan were denied and if no additional contributions (other than those already made by the termination date) were made for the plan year in which the termination date occurs or for any previous plan year),

(2) the outstanding balance of the amount of waived funding deficiencies of the plan waived before such date under section 1083 of this title or section 412(d) of title 26 (if any), and

(3) the outstanding balance of the amount of decreases in the minimum funding standard allowed before such date under section 1084 of this title or section 412(e) of title 26 (if any),

together with interest (at a reasonable rate) calculated from the termination date in accordance with regulations prescribed by the corporation. The liability under this subsection shall be due and payable to such trustee as of the termination date, in cash or securities acceptable to such trustee.

(d) Definitions

(1) Collective net worth of persons subject to liability

(A) In general

The collective net worth of persons subject to liability in connection with a plan termination consists of the sum of the individual net worths of all persons who—

(i) have individual net worths which are greater than zero, and

(ii) are (as of the termination date) contributing sponsors of the terminated plan or members of their controlled groups.

(B) Determination of net worth

For purposes of this paragraph, the net worth of a person is—

(i) determined on whatever basis best reflects, in the determination of the corporation, the current status of the person's operations and prospects at the time chosen for determining the net worth of the person, and

(ii) increased by the amount of any transfers of assets made by the person which are determined by the corporation to be improper under the circumstances, including any such transfers which would be inappropriate under title 11 if the person were a debtor in a case under chapter 7 of such title.

(C) Timing of determination

For purposes of this paragraph, determinations of net worth shall be made as of a day chosen by the corporation (during the 120-day period ending with the termination date) and shall be computed without regard to any liability under this section.

(2) Pre-tax profits

The term "pre-tax profits" means—

(A) except as provided in subparagraph (B), for any fiscal year of any person, such person's consolidated net income (excluding any extraordinary charges to income and including any extraordinary credits to income) for such fiscal year, as shown on audited financial statements prepared in accordance with generally accepted accounting principles, or

(B) for any fiscal year of an organization described in section 501(c) of title 26, the excess of income over expenses (as such terms are defined for such organizations under generally accepted accounting principles),

before provision for or deduction of Federal or other income tax, any contribution to any single-employer plan of which such person is a contributing sponsor at any time during the period beginning on the termination date and ending with the end of such fiscal year, and any amounts required to be paid for such fiscal year under this section. The corporation may by regulation require such information to be filed on such forms as may be necessary to determine the existence and amount of such pre-tax profits.

(e) Treatment of substantial cessation of operations

If an employer ceases operations at a facility in any location and, as a result of such cessation of operations, more than 20 percent of the total number of his employees who are participants under a plan established and maintained by him are separated from employment, the employer shall be treated with respect to that plan as if he were a substantial employer under a plan under which more than one employer makes contributions and the provisions of sections 1363, 1364, and 1365 of this title shall apply.

All 11 U.S.C. citations are to the 1988 edition of United States Code

11 U.S.C. § 502

§ 502. Allowance of claims or interests

(a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that—

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds—

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of—

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds—

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of—

(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates; or

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor.

(c) There shall be estimated for purposes of allowance under this section—

(1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case; or

(2) any right to payment arising from a right to an equitable remedy for breach of performance.

(d) Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

(e)(1) Notwithstanding subsections (a), (b), and (c) of this section and paragraph (2) of this subsection, the court shall disallow any claim for reimbursement or contribution of an entity that is liable with the debtor on or has secured the claim of a creditor, to the extent that—

(A) such creditor's claim against the estate is disallowed;

(B) such claim for reimbursement or contribution is contingent as of the time of allowance or disallowance of such claim for reimbursement or contribution; or

(C) such entity asserts a right of subrogation to the rights of such creditor under section 509 of this title.

(2) A claim for reimbursement or contribution of such an entity that becomes fixed after the commencement of the case shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) of this section, the same as if such claim had become fixed before the date of the filing of the petition.

(f) In an involuntary case, a claim arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the

appointment of a trustee and the order for relief shall be determined as of the date such claim arises, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(g) A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(h) A claim arising from the recovery of property under section 522, 550, or 553 of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(i) A claim that does not arise until after the commencement of the case for a tax entitled to priority under section 507(a)(7) of this title shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section, or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

(j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered

claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

11 U.S.C. § 1123

§ 1123. Contents of plan

(a) Notwithstanding any otherwise applicable non-bankruptcy law, a plan shall—

(1) designate, subject to section 1122 of this title, classes of claims, other than claims of a kind specified in section 507(a)(1), 507(a)(2), or 507(a)(7) of this title and classes of interests;

(2) specify any class of claims or interests that is not impaired under the plan;

(3) specify the treatment of any class of claims or interests that is impaired under the plan;

(4) provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest;

(5) provide adequate means for the plan's implementation, such as—

(A) retention by the debtor of all or any part of the property of the estate;

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(C) merger or consolidation of the debtor with one or more persons;

(D) sale of all or any part of the property of the estate, either subject to or free of any lien, or the distribution of all or any part of the property of the estate among those having an interest in such property of the estate;

(E) satisfaction or modification of any lien;

(F) cancellation or modification of any indenture or similar instrument;

(G) curing or waiving of any default;

(H) extension of a maturity date or a change in an interest rate or other term of outstanding securities;

(I) amendment of the debtor's charter; or

(J) issuance of securities of the debtor, or of any entity referred to in subparagraph (B) or (C) of this paragraph, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose;

(6) provide for the inclusion in the charter of the debtor, if the debtor is a corporation, or of any corporation referred to in paragraph (5)(B) or (5)(C) of this subsection, of a provision prohibiting the issuance of nonvoting equity securities, and providing as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any class of equity securities having a preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing such preferred class in the event of default in the payment of such dividends; and

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee.

(b) Subject to subsection (a) of this section, a plan may—

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

(2) subject to section 365 of this title, provide for the assumption, rejection, or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;

(3) provide for—

(A) the settlement or adjustment of any claim or interest belonging to the debtor or to the estate; or

(B) the retention and enforcement by the debtor, by the trustee, or by a representative of the estate appointed for such purpose, of any such claim or interest;

(4) provide for the sale of all or substantially all of the property of the estate, and the distribution of the proceeds of such sale among holders of claims or interests; and

(5) include any other appropriate provision not inconsistent with the applicable provisions of this title.

(c) In a case concerning an individual, a plan proposed by an entity other than the debtor may not provide for the use, sale, or lease of property exempted under section 522 of this title, unless the debtor consents to such use, sale, or lease.

(2)

Supreme Court, U.S.
FILED
JUN 29 2001
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No. 00-1789

In The

Supreme Court of the United States

PENSION BENEFIT GUARANTY CORPORATION,

Petitioner,

v.

KATHRYN A. BELFANCE, TRUSTEE, the Copperweld Steel Company Liquidation Trust,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JOSEPH F. HUTCHINSON, JR.*
CLAIR E. DICKINSON
BROUSE MCDOWELL
Attorneys for Respondent
500 First National Tower
Akron, OH 44308
(330) 535-5711

**Counsel of Record*

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34 pp

QUESTION PRESENTED

Whether bankruptcy claims of the Pension Benefit Guaranty Corporation ("PBGC") for unfunded future benefit liabilities are properly calculated by using a discount rate that establishes the true economic value of the claims "as of the date of the filing of the petition" as required by 11 U.S.C.A. § 502(b).

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Kathryn A. Belfance, Trustee of the Copperweld Steel Company Liquidation Trust, submits this brief in opposition to the petition for a writ of certiorari filed by the Pension Benefit Guaranty Corporation ("PBGC").

STATEMENT OF THE CASE

It is a fundamental principle of bankruptcy law that similarly situated creditors are to be treated equally. Each creditor in a particular class is to receive a pro rata share of that part of the debtor's estate available for distribution to all the members of that class. The PBGC, however, argued to the courts below that this fundamental principle should not apply to its claims for unfunded benefit liabilities. It argued for application of a discount rate to its unfunded benefit liabilities claims that would have resulted in those claims being allowed at 27 times their true value to the detriment of every other creditor in its class. The courts below rejected the PBGC's attempt to secure a disproportionately large share of the debtors' estates. The PBGC has now sought review in this Court.

1. The Parties

Copperweld Steel Company was a Warren, Ohio, manufacturer and supplier of specialty steel products. On November 23, 1993, it and its corporate parent, CSC

Industries Inc., filed voluntary petitions for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C.A. §§ 1101-1174 (1993). The two cases were consolidated pursuant to a plan of reorganization that was adopted by the bankruptcy court. Under the plan, respondent Kathryn A. Belfance was appointed Trustee of the Copperweld Steel Company Liquidation Trust.

The PBGC is a corporation, wholly owned by the United States, that administers an insurance program for defined benefit pension plans. 29 U.S.C.A. § 1302 (1999). In return for premiums paid it, the PBGC guarantees that, if a defined benefit pension plan is terminated, the beneficiaries of that plan will receive, within statutory limits, their pension benefits. 29 U.S.C.A. § 1322 (1999). When the assets in a terminated plan are not sufficient to make the guaranteed payments to plan beneficiaries as those payments become due, the PBGC, in effect, "makes up" the deficiency. The PBGC, in turn, has a claim against the plan sponsor for that deficiency ("the unfunded benefit liabilities"). 29 U.S.C.A. § 1362(b)(1)(A) (1999).

Copperweld sponsored three separate defined benefit pension plans for different segments of its workforce. Those plans were terminated on September 30, 1995. The PBGC filed proofs of claim with the bankruptcy court for unfunded benefit liabilities of each of the three plans. Ms. Belfance objected to the amounts of those claims.

2. Defined Benefit Pension Plans and Unfunded Benefit Liabilities

A defined benefit pension plan provides that an employee, upon retirement, will receive a specific amount

as an annual pension benefit. That amount is calculated using a formula that incorporates factors such as the employee's years of service and his or her final salary. *See Pension Benefit Guaranty Corporation v. LTV Corporation*, 496 U.S. 633, 637 n. 1 (1990).

Prior to adoption of the Employee Retirement Income Security Act of 1974 (ERISA), employers who provided defined benefit pension plans for their employees typically paid benefits due under those plans with funds earned by the employer during the year in which those benefits were paid. Wolfe, *Is Your Pension Safe? A Call For Reform Of The Pension Benefit Guaranty Corporation And Protection Of Pension Benefits*, 24 Sw. U. L. Rev. 145, 162 (1994). ERISA, however, established a requirement that defined benefit pension plans be "pre-funded." Pursuant to ERISA, if an employer maintains a defined benefit pension plan, it must annually pay into that pension plan a contribution that consists of two parts – "normal costs" and "past service obligations." 29 U.S.C.A. § 1082 (1999).

The "normal costs" part of an employer's annual payment is an amount calculated to provide that portion of the retirement benefits to which its employees will in the future be entitled as a result of their employment during the current year. 29 U.S.C.A. § 1002(28) (1999). The "normal costs" for any given year are calculated by actuaries based upon a number of assumptions dealing with, among other things, expected retirement ages, life expectancy, and the return that can be expected from investing the money paid into the plan. *See* Wolfe, *Is Your Pension Safe? A Call For Reform Of The Pension Benefit Guaranty Corporation And Protection Of Pension Benefits*, 24 Sw. U. L. Rev. 145, 164 (1994).

The "past service obligations" part of an employer's annual payment is based upon its employees' work during prior years. "Past service obligations" can arise for a number of reasons. Two are illustrative.

First, as mentioned previously, prior to adoption of ERISA, employers did not typically pre-fund defined benefit pension plans. Upon adoption of ERISA, therefore, employers with preexisting plans owed those plans money based upon years that their participating employees had already worked and for which the employers had not paid the "normal costs." Pursuant to ERISA, those employers were afforded 40 years within which to amortize the amounts owed for years prior to adoption of ERISA. 29 U.S.C.A. § 1082(b)(2)(B)(i) (1999). Similarly, upon establishment of a new plan, there is an immediate deficit because of prior years worked by individuals now covered by the plan. Employers who have established defined benefit pension plans since adoption of ERISA are afforded 30 years within which to amortize the amounts owed for years worked by plan participants before adoption of the plan. 29 U.S.C.A. § 1082(b)(2)(B)(ii) (1999). Employers with "past service obligations" based on pre-ERISA or pre-plan employment must make payments on those obligations each year. 29 U.S.C.A. § 1082(b)(2) (1999).

Second, because of the nature of a defined benefit pension plan, it is necessary each year to reexamine the amounts paid during previous years to determine whether, based upon newly available information, those amounts will be sufficient to generate the benefits to which employees will be entitled based upon their employment during those prior years. Perhaps the plan's

return on investment has proven to be less than expected. Or, perhaps, changes in the life expectancy tables have increased the period during which it can be anticipated the retirees will collect benefits. Sometimes, negotiations between an employer and its employees result in an increase in the amount of benefits to which retirees will be entitled. When any of these, or similar events occur, reexamination by the actuaries results in a conclusion that, although it was believed in prior years that the "normal costs" paid in those years were sufficient to generate the benefits to which employees will be entitled upon retirement based upon their work during those years, the information now available shows that additional payments into the plan will be required to do so. Under ERISA, employers are permitted to amortize additional amounts necessary to supplement "normal costs" paid in prior years over a number of years. 29 U.S.C.A. § 1082(b)(2)(B)(iii)-(v) (1999).

Because ERISA allows employers to amortize "past service obligations" over a number of years, many defined benefit pension plans for which employers have made all their required annual payments as they became due would be underfunded if they were terminated. *See* Keating, *Chapter 11's New Ten-Ton Monster: The PBGC and Bankruptcy*, 77 Minn. L. Rev. 803, 812 (1993). ERISA requires sponsors of most defined benefit pension plans to participate in the termination insurance program administered by the PBGC to guarantee that, if a covered plan is terminated, participants and beneficiaries will receive, within statutory limits, the benefits they have been promised. 29 U.S.C.A. § 1321 (1999).

Under ERISA, covered plans may be terminated voluntarily or involuntarily. There are two types of voluntary terminations.

The first type of voluntary plan termination is a "standard" voluntary termination. A standard voluntary termination does not implicate the PBGC's insurance function because a pension plan can only be terminated pursuant to a standard voluntary termination if it is "fully funded." To complete a standard voluntary termination, the sponsor must purchase close-out annuities that will pay all benefits to which plan beneficiaries will become entitled. 29 U.S.C.A. § 1341(b) (1999); Keating, *Chapter 11's New Ten-Ton Monster: The PBGC and Bankruptcy*, 77 Minn. L. Rev. 803, 808 (1993).

The second type of voluntary plan termination is a "distress" termination. In order to terminate a pension plan in this manner, the employer must demonstrate that it is in financial "distress." Among the situations in which a distress termination is possible is when the employer is in a reorganization proceeding and the bankruptcy court determines that, in the absence of a termination, the employer will not survive outside bankruptcy. 29 U.S.C.A. § 1341(c) (1999); Keating, *Chapter 11's New Ten-Ton Monster: The PBGC and Bankruptcy*, 77 Minn. L. Rev. 803, 808 (1993).

The PBGC can seek involuntary termination of a plan if the employer fails to pay the PBGC premium payments due it or fails to make its required annual contributions to the plan. It also can seek involuntary termination if the plan is unable to pay benefits when due or if continuation of the plan will result in long-term loss for the PBGC. In

order to complete an involuntary plan termination, the PBGC either must reach an agreement with the employer or obtain federal court approval. 29 U.S.C.A. § 1342(a) (1999); Keating, *Chapter 11's New Ten-Ton Monster: The PBGC and Bankruptcy*, 77 Minn. L. Rev. 803, 808 (1993).

3. This Case

As mentioned previously, Copperweld sponsored three separate defined benefit pension plans for different segments of its workforce. The PBGC filed an action in the United States District Court for the Northern District of Ohio against Copperweld and CSC, seeking an order involuntarily terminating those plans. Eventually, that action was settled and dismissed based upon an agreement among the PBGC, Copperweld, and CSC that the plans would be terminated on September 30, 1995, and the PBGC would become trustee of the terminated plans. Upon termination, assets in the three plans worth $126,731,224 were transferred to the PBGC.

In addition to receiving the assets of the three terminated plans, the PBGC filed proofs of claim in Copperweld's and CSC's bankruptcy proceedings for amounts it asserted represented the unfunded benefit liabilities of the three terminated plans. According to the PBGC, the total of those unfunded benefit liabilities, as of the date the plans were terminated, was $49,658,703. Ms. Belfance objected to the amount of the PBGC's unfunded benefit liabilities claims.

The PBGC calculated its claims via a three-step process. First, its actuaries calculated the guaranteed benefits

to which plan beneficiaries would be entitled. They did that through the use of assumptions regarding such things as expected retirement ages and life expectancy. Second, the PBGC purported to reduce those guaranteed benefits to their present value as of the plan termination date by applying interest factors (referred to at times as "discount rates"). Pursuant to the assumptions used by the PBGC to complete this step, it concluded that the present value of the guaranteed benefits as of the plan termination date was $176,389,927. Finally, it compared that amount to the value of the plan assets that had been delivered to it upon termination, $126,731,224, and concluded that the plans had unfunded benefit liabilities totaling $49,658,703.

As mentioned previously, Ms. Belfance objected to the amount of the PBGC's unfunded benefit liabilities claims. Specifically, she challenged the second step of the process used by the PBGC. Instead of using interest factors aimed at calculating the true present value of the future guaranteed benefits, the PBGC used artificially low interest factors of 6.4% for the first 20 years and 5.75% thereafter. The PBGC has stipulated that it chose those rates, not for the purpose of accurately calculating the amount it would need to invest as of the plan termination date to generate the benefits to which plan participants will become entitled, but rather in order to duplicate the amount "a plan sponsor would have paid a private insurer for a close-out annuity that covers the same benefits."

Ms. Belfance argued that the discount rates used by the PBGC were unreasonably low, resulting in wildly overstated claims. Among other things, she pointed out

that the PBGC does not purchase close-out annuities. Rather, it invests assets it receives from terminated plans in a Trust Fund Account, which, according to the PBGC's 1995 Annual Report, had earned a return on investment of 16.6% during the five years ending September 30, 1995. 1995 PBGC Ann. Rep. 24.[1] She further pointed out that, from the inception of ERISA in 1976 through September 30, 1995, the PBGC had earned a combined return on its investment in its Trust Fund Account and its Revolving Account, the account in which it deposits its premium revenues, of 11.3%, which is far in excess of the 6.4% and 5.75% it sought to have applied in this case. Ms. Belfance argued that, to prevent the PBGC from receiving a huge windfall at the expense of other creditors of Copperweld and CSC, a "prudent investor rate" should be used to calculate the PBGC's unfunded benefit liabilities claims.

The PBGC argued that two provisions of Title IV of ERISA, Sections 1362(b)(1)(A) and 1301(a)(18) of Title 29 of the United States Code, required the bankruptcy court to allow its claims as the PBGC had calculated them. Section 1362(b)(1)(A) provides that a sponsor of a terminating pension plan is liable to the PBGC for "the total unfunded benefit liabilities (as of the termination date) to all participants and beneficiaries under the plan. . . . " The phrase "amount of unfunded benefit liabilities" is defined, for purposes of Title IV of ERISA, at Section 1301(a)(18) of Title 29. That definition refers to assumptions contained in a regulation adopted by the PBGC:

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[1] For the five-year period ending September 30, 2000, the PBGC's return on its equity investments was 19.9%. 2000 PBGC Ann. Rep. 17.

> (18) "amount of unfunded benefit liabilities" means, as of any date, the excess (if any) of –
>
> (A) the value of the benefit liabilities under the plan (determined as of such date on the basis of assumptions prescribed by the [PBGC] for purposes of section 1344 of this title), over
>
> (B) the current value (as of such date) of the assets of the plan;. . . .

The assumptions referred to in Section 1301(a)(18) are found in a regulation, 29 C.F.R. § 2619, drafted by the PBGC for the purpose of discouraging pension plan terminations. As mentioned previously, ERISA allows a defined benefit pension plan sponsor to voluntarily terminate a plan through a "standard" termination. That procedure is expensive because, in order to complete it, the plan sponsor must purchase, from a private insurer, "close-out" annuities that will pay all benefits to which plan beneficiaries will become entitled. 29 U.S.C.A. § 1341(b) (1999); Keating, *Chapter 11's New Ten-Ton Monster: The PBGC and Bankruptcy*, 77 Minn. L. Rev. 803, 808 (1993). The amount necessary to purchase such annuities is far more than what must be invested at a "reasonably prudent investor" rate to earn the same return. The PBGC stipulated that it drafted 29 C.F.R. § 2619, which is applicable to "distress" and involuntary plan terminations, to duplicate the price a plan sponsor would have to pay a private insurer for a close-out annuity in order to complete a standard voluntary plan termination. That is, the PBGC drafted 29 C.F.R. § 2619 as it did to make sure that distress and involuntary plan terminations would not be more attractive to plan sponsors than are standard terminations. The PBGC did not want employers who wished

to terminate their defined benefit pension plans to be able to get a "better deal" by not making their premium payments and minimum funding contributions, thereby causing the PBGC to seek an involuntary termination, than they can get through a standard voluntary termination. In short, the PBGC's regulation is meant to discourage plan terminations by employers.

Pursuant to the Plan of Reorganization adopted by the bankruptcy court in this case, the PBGC's unfunded benefit liabilities claims were classified as Class 5B general unsecured claims. A cash reserve was created within the estate to cover the maximum pro rata amount the PBGC could receive on its unfunded benefit liabilities claims. To the extent the cash reserve is not distributed to the PBGC, it will be distributed to the other Class 5B general unsecured creditors. None of that reserve will go to the debtors or any decision-makers of the debtors.

In an opinion issued on December 3, 1997, the bankruptcy court rejected the PBGC's argument and determined that a "prudent investor rate" should be used to calculate the value of its unfunded benefit liabilities claims as of the plan termination date. Pet. App. 7a. The parties thereafter stipulated that "[t]en percent, net of all administrative expenses, is a rate of return on pension funds that could be expected by a 'reasonably prudent investor' of pension funds." The value of PBGC's unfunded benefit liabilities claims, as of the plan termination date, calculated through application of a reasonably prudent investor rate of 10%, is $1,822,075, approximately $1/27$ of the amount the PBGC sought by its proofs of claim. By its Judgment of December 8, 1998, the bankruptcy court applied the prudent investor rate and allowed the

PBGC general unsecured claims of $1,822,075. Pet. App. 10a-11a.

The PBGC appealed the bankruptcy court's decision to the United States District Court for the Northern District of Ohio. On August 10, 1999, the district court affirmed the decision of the bankruptcy court. Pet. App. 12a-19a. In doing so, it relied heavily on the reasoning of the United States Court of Appeals for the Tenth Circuit in *Pension Benefit Guaranty Corp. v. CF & I Fabricators of Utah, Inc.*, 150 F.3d 1293 (10th Cir. 1998), *cert. denied*, 526 U.S. 1145 (1999), which had rejected the identical argument being made by the PBGC. The district court concluded that, "[a]lthough PBGC's valuation method is valid in other contexts, . . . it is not the appropriate valuation method in Bankruptcy Court." Pet. App. 18a.

The PBGC appealed the decision of the district court to the United States Court of Appeals for the Sixth Circuit. The court of appeals, on November 17, 2000, affirmed. It noted that, in order to deal with Copperweld's debts under a reorganization plan, the bankruptcy court was required to reduce all its liabilities to their present value. Pet. App. 22a. It then considered whether the bankruptcy court had acted properly in using a reasonably prudent investor rate to make that reduction. While acknowledging that the Court of Appeals for the Tenth Circuit, in *CF & I*, had rejected the very argument being made by the PBGC, it did not adopt that court's reasoning in its entirety. Specifically, it noted that the court in *CF & I* had relied, in part, upon a provision found in subchapter I of ERISA that did not appear applicable to the question in front of it:

> We are not entirely persuaded that the district and CF & I courts were correct in concluding that 29 U.S.C. § 1144(d), which provides that "nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States," requires that the ERISA provision, 29 U.S.C. § 1301(a)(18), be subordinated to the Bankruptcy Code. Section 1144(d), on its face, applies only to subchapter I of ERISA, whereas the definition of unfunded benefit liabilities, section 1301(a)(18), is found in subchapter III of ERISA.

Rather, the reasoning of the court of appeals in this case was guided by Sections 502(b) and 1123(a)(4) of the Bankruptcy Code:

> Under 11 U.S.C. § 502(b), the bankruptcy court must, upon objection to a claim, "determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition." Therefore, the bankruptcy court must value present claims and reduce claims for future payment to present value, while also keeping in mind that a fundamental objective of the Bankruptcy Code is to treat similarly situated creditors equally. *See* 11 U.S.C. § 1123(a)(4).

Pet. App. 23a. The court concluded that "the bankruptcy court's authority under 11 U.S.C. §§ 502(b) and 1123(a)(4) to determine the amount of claims in bankruptcy proceedings and treat creditors in the same class equally gives it the authority to value unfunded benefit liabilities claims using a 'prudent investor rate.' " Pet. App. 25a.

ARGUMENT

I. THERE IS NO COMPELLING REASON TO GRANT THE PETITION

The issue raised by the PBGC does not warrant granting its petition. It is a narrow question of bankruptcy law, the resolution of which is controlled by two federal statutes, Sections 502(b) and 1123(a)(4) of the Bankruptcy Code, 11 U.S.C.A. §§ 502(b) & 1123(a)(4) (1999). There is no conflict between the decision of the United States Court of Appeals for the Sixth Circuit in this case and decisions of this Court or other courts of appeals. In fact, as noted by the PBGC itself, there is "an unbroken line of appellate and lower court decisions" rejecting the PBGC's position.[2] Pet. 11. The Court of Appeals for the Tenth Circuit, the only other appellate court to consider the PBGC's argument, rejected it in *Pension Benefit Guaranty Corp. v. CF & I Fabricators of Utah, Inc.*, 150 F.3d 1293 (10th Cir. 1998), *cert. denied*, 526 U.S. 1145 (1999), and this Court denied certiorari. The only thing of relevance that has happened in the two years since that denial was the decision of the court of appeals in this case. A decision in which the court, while refusing to follow a questionable aspect of the Tenth Circuit's reasoning, reached the same conclusion.

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[2] The "unbroken line" is not particularly long. In addition to this case, it consists of *PBGC v. CF & I Fabricators*, 150 F.3d 1293 (10th Cir. 1998), *cert. denied*, 526 U.S. 1145 (1999), and *LTV Corp. v. PBGC (In re Chateaugay Corp.)* 130 B.R. 690 (S.D.N.Y. 1991), 126 B.R. 165 (Bankr. S.D.N.Y. 1991) and 115 B.R. 760 (Bankr. S.D.N.Y. 1990), *vacated by consent order*, 17 Employee Benefits Cas. (BNA) 1102 (S.D.N.Y. 1993). Accordingly, it would be premature to grant certiorari in this case.

Much of the PBGC's argument in favor of this Court granting certiorari is, at bottom, simply an argument that, because of its role as guarantor of pension funds, it should be excused from participating in the judicial system on the same footing as other parties. It argues that its petition should be granted because the court of appeals decision "has an immediate and continuing impact" on it. Pet. 11. It is not at all unusual for judicial decisions to have immediate and continuing impact on parties to those decisions. It further argues that it should receive special treatment in bankruptcy, different from the treatment afforded other creditors. *See* Pet. 12-13. To the extent that the PBGC seeks special treatment, however, it has come to the wrong forum. If, indeed, there were legitimate policy considerations for treating the PBGC differently from other parties before the bankruptcy court, Congress, not this Court, would be the proper forum to weigh those considerations. Even if the question presented by the PBGC were proper for this Court to resolve, this petition is premature. The question presented has only been considered by two appellate courts, both of which reached the same conclusion. There is no compelling reason for this Court to become involved in this issue at this time.

The PBGC has argued that this Court should grant certiorari in this case because it may not get another opportunity to review the question presented in the near future. According to the PBGC, because there are two levels of review of a bankruptcy court's decisions, "it is likely to be many years before the issue of PBGC's termination liability claim can be presented to another court of

appeals." Pet. 11. The PBGC's 2000 Annual Report, however, indicates that, "[a]t the end of the year, PBGC had 81 active cases in state and federal courts and 575 bankruptcy cases." 2000 PBGC Ann. Rep. 19. If the question presented in this case is anywhere near as critical as the PBGC would have this Court believe, it must surely be present in a number of those other cases in which the PBGC is a party. If the PBGC ever succeeds in convincing an appellate court to accept its position on this issue, then, perhaps, there would be a reason for this Court to consider granting certiorari. Those cases should proceed through the judicial system just as other cases do. There is no reason to accelerate review of the question presented just because that question is presented by the PBGC. The PBGC's fear that this Court may not have an opportunity to review the question presented for "many years" is baseless conjecture and not a reason to grant certiorari in this case.

Much of the PBGC's petition is focused on dire predictions that the decision of the court of appeals in this case will spell doom for the nation's pension system. According to the PBGC, this case presents a "recurring issue that has plagued PBGC for more than a decade. . . . " Pet. 9. It has asserted that the decision below "has an immediate and continuing impact on [it], particularly in light of the slowdown in the U.S. economy and the recent wave of corporate bankruptcies." Pet. 11. In fact, according to the former executive director of the PBGC, it ended the year 2000 "in its best shape ever." *See* 2000 PBGC Ann. Rep. 3. The single-employer program, the program relevant to this case, had a record net income last year of nearly $2.7 billion, and now has a surplus of

$9.7 billion. *Id.* at 14-15. The history of the single-employer program over the last decade, and particularly over the last five years, could not contrast more starkly with the PBGC's cries of doom.

Prior to 1987, the PBGC was limited in its recovery of unfunded benefit liabilities from a plan sponsor to 30% of that sponsor's net worth. *See* Pet. 12. With the passage of the Pension Protection Act of 1987, Congress removed that limitation.[3] In doing so, Congress intended to strengthen the PBGC's financial condition. It did so. While the PBGC experienced deficits in its single-employer program for the first 20 years of its existence, it began experiencing surpluses in that program in 1996. Those surpluses have grown steadily from $869 million in 1996 to this year's $9.7 billion. *See* PBGC, *Pension Insurance Data Book 1999* 17 (Table S-1) (2000); 2000 PBGC Ann. Rep. 15. That growth took place without the PBGC being successful in convincing a single court to accept its position that it is entitled to favored treatment in bankruptcy. If Congress were to decide that the PBGC's financial condition should be further strengthened by permitting it to recover amounts in bankruptcy far in excess of the actual unfunded benefit liabilities of terminated pension plans, it could pass legislation authorizing such recoveries. It has not, and it would not be appropriate for this Court to allow such recoveries at the expense of other creditors.

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[3] Pension Protection Act of 1987, Subtitle D of Title IX of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203 § 9312(b)(2)(A).

Certainly, the PBGC's desire to further increase its surplus is understandable, but accomplishment of that desire through having its claims in bankruptcy grossly inflated would come at the expense of other creditors of bankrupt plan sponsors. Pursuant to the decisions of the lower courts in this case, based on the true economic value of the PBGC's claims, it will receive 4.6% of the remaining net distributable estate, with the other 95.4% going to the other Class 5B unsecured creditors based on the true economic value of their claims. If the PBGC had been successful in convincing the lower courts to allow its claims at 27 times their true value, it would have received 93.56% of the remaining net distributable estate while the other Class 5B unsecured creditors, restricted to the true ecomomic value of their claims, would have received only 6.44% of the remaining net distributable estate. This unequal treatment of creditors within the same class would run counter to the bankruptcy principle of equality and would violate Section 502(b) of the Bankruptcy Code, 11 U.S.C.A. § 502(b) (1999).

To the extent that the PBGC's predictions of doom for itself in view of the "slowdown in the U.S. economy" are anywhere near accurate, the outlook is just as bad, if not worse, for the other Class 5B unsecured creditors of Copperweld, most of whom are trade vendors to the steel industry. It is doubtful that any of those other creditors has accumulated a $9.7 billion surplus upon which to fall back. Perhaps those creditors are themselves sponsors of defined benefit pension plans insured by the PBGC. If the PBGC were successful in fulfilling its desire to further

build its surplus on their backs, that success could contribute to additional bankruptcies and additional pension plan terminations.

The PBGC also has complained that the decision of the court of appeals "requires a battle of experts in each case" and "provides no objective standard for courts to apply." Pet. 16. As noted previously, in this case, Ms. Belfance and the PBGC were able to agree that ten percent, net of all administrative expenses, represented a reasonably prudent investor rate of return. If the parties were unable to reach such an agreement in other cases, bankruptcy courts are well equipped to determine a reasonably prudent investor rate of return. It is a large part of a bankruptcy court's normal function to sit as a finder of fact on questions of valuation. *See, e.g., Associates Commercial Corp. v. Rash*, 520 U.S. 953, 965 (1997).

In this case, the PBGC argued for application of a discount rate of 6.4% for the first 20 years and 5.75% thereafter. The bankruptcy court applied a discount rate of 10%, which the parties stipulated was a rate to be expected by a reasonably prudent investor. The PBGC's actual rate of return on its equity investments for the year ending September 30, 2000, was 18.2% and, for the five-year period ending on that same date, was 19.9%. 2000 PBGC Ann. Rep. 17. There is no compelling reason for this Court to grant the PBGC's petition in this case.

II. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT CORRECTLY DETERMINED THE DISCOUNT RATE TO BE USED IN ALLOWING THE PBGC'S UNFUNDED BENEFIT LIABILITIES CLAIMS

It is a normal function of a bankruptcy court to reduce amounts payable in the future to their present value. That function is specifically assigned to bankruptcy courts by Section 502(b) of the Bankruptcy Code, 11 U.S.C.A. § 502(b) (1999). Further, equality of distribution is the theme of bankruptcy. *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, *reh. denied*, 313 U.S. 600 (1941). In bankruptcy, creditors of the same class are to be treated equally.

As long ago noted by Justice Frankfurter, laws are designed to accomplish particular ends in specific situations:

> [L]aws are not abstract propositions. They are expressions of policy arising out of specific situations and addressed to the attainment of particular ends.

Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Columbia L. Rev. 527, 533 (1947). In bankruptcy, the theme of equality of distribution is advanced by accurately reducing future obligations to their present value. The regulation relied upon by the PBGC was adopted for attainment of a different end in a different situation. It not only does not advance bankruptcy's theme of equality, it runs counter to it. It exists for a completely different purpose – a purpose that is appropriate outside bankruptcy, but not in bankruptcy.

Congress created the PBGC for three specific purposes:

> (1) to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants,
>
> (2) to provide for the timely and uninterrupted payment of pension benefits to participants and beneficiaries under plans to which [ERISA] applies, and
>
> (3) to maintain premiums established by the [PBGC] . . . at the lowest level consistent with carrying out its obligations under [ERISA].

29 U.S.C.A. § 1302(a) (1999). The PBGC has described 29 C.F.R. § 2619 as a "carefully calibrated levy" that "acts as a counterweight to any incentive an employer may have to dump a pension plan on PBGC to rid itself of an unwanted financial burden." Pet. at 10. This "levy" is consistent with the first purpose assigned the PBGC by Congress for purposes of ERISA – to encourage continuation and maintenance of voluntary private pension plans. It furthers that purpose outside of bankruptcy. Within the context of bankruptcy, however, it does not further that purpose.

Much of the PBGC's petition is based upon speculation that plan sponsors will be lining up to file bankruptcy petitions as a result of the court of appeals decision in this case. According to the PBGC, "bargain-basement terminations" are available to employers because of the lower court's action, resulting in "perverse economic incentives." Pet. 14, 16. There is nothing in the record of this case, however, that indicates that Copperweld or CSC filed their petitions in bankruptcy in an

effort to get a "bargain-basement termination" of the pension plans at issue. In fact, neither the debtors nor individual decision-makers involved in filing their petitions for reorganization stand to gain anything as a result of the court of appeals decision in this case. As mentioned previously, a cash reserve was created to cover the maximum pro rata amount the PBGC could receive on its unfunded benefit liabilities claims. Neither the debtors nor individuals that were decision-makers of the debtors will share in that reserve. To the extent the money held in it is not distributed to the PBGC, it will be distributed to the other Class 5B unsecured creditors. The PBGC's fear that the court of appeals decision provides employers an opportunity to somehow profit though terminating their pension plans in bankruptcy finds no support in this case. Further, this case is no different from the vast majority of bankruptcy cases. Bankruptcy courts are about the business of dividing assets among creditors. The court of appeals decision in this case will not put any money in the debtors' pockets or in the pockets of the debtors' decision-makers. The PBGC's claimed "perverse economic incentives" are products of baseless speculation.

Bankruptcy courts calculate the present value of claims of creditors for the sole purpose of insuring that those creditors are treated equitably. Congress could not have intended for the PBGC to attempt to further its goal of discouraging pension plan terminations at the expense of other creditors in bankruptcy, particularly since increasing the PBGC's recovery at the expense of those other creditors would not advance that goal. Section 1301 of Title 29, one of the statutes relied upon by the PBGC as authority for 29 C.F.R. § 2619, specifically provides that

its definitions are only "[f]or purposes of this title" (Title IV of ERISA). Once an employer is in bankruptcy, the Bankruptcy Code rather than 29 C.F.R. § 2619 controls reduction of claims to their present value.

The PBGC, however, has argued that the bankruptcy court had no choice but to apply the interest factors contained in 29 C.F.R. § 2619 to calculate its unfunded benefit liabilities claims. According to it, it drafted that regulation pursuant to authority Congress delegated it in Sections 1301(a)(18) and 1362(b)(1)(A) of Title 19 of the United States Code, and the bankruptcy court had to defer to its selection of interest factors. It has suggested that it is the "master of the subject" and that Congress intended its policy determination to control over the bankruptcy requirement of equality. *See* Pet. at 17 (citing *United States v. Cleveland Indians Baseball Co.*, 121 S.Ct. 1433, 1444 (2001)).

There is no doubt that the PBGC is the "master of the subject" when it comes to the first step it follows in calculating unfunded benefit liabilities. Neither Ms. Belfance nor the lower courts have questioned the legitimacy of the assumptions used by the PBGC regarding such things as expected retirement ages or life expectancies. It is entirely proper for the PBGC to determine what future benefits will be due from the terminated plans. The PBGC, however, has no special expertise when it comes to reducing those future obligations to their present value. That is a function of the bankruptcy court, specifically

assigned to it by Section 502(b) of the Bankruptcy Code.[4] In fact, the PBGC does not claim that it has special expertise that allows it to more accurately reduce future benefits to their present value. Rather, it readily admits that it does not attempt to do that. It uses discount factors specifically chosen to value future obligations at more than their present value in an attempt to pursue its assigned purpose of discouraging early terminations of pension plans.

It is not unusual for the Bankruptcy Code to "reshape[ ] debtor and creditor rights in marked departure from [non-bankruptcy law]." *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997). For example, in *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213 (1996), this Court considered whether the fact that Congress had called a certain charge a "tax" as part of the Internal Revenue Code, meant that it was a "tax" for purposes of priority treatment in bankruptcy. It concluded that it did not. Rather than a bankruptcy court being required to mechanically accept the name placed on the charge by non-bankruptcy law, it was required to look behind that name and determine whether the true nature of the charge at issue was that of a tax. In that case, this Court determined that the charge at issue was not a tax. In this case, although the PBGC stipulated that its use of unreasonably low discount factors in calculating its unfunded benefit liabilities claims was for a purpose

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[4] As recognized by this Court in *Pension Benefit Guarantee Corporation v. LTV Corporation*, 496 U.S. 633, 646 (1990), the PBGC "can claim no expertise in the labor and bankruptcy areas."

other than arriving at the true value of its claims, it has argued that the bankruptcy court was not permitted to look past those calculations to arrive at the true value of those claims. Just as this Court held in *Reorganized CF & I Fabricators* that the bankruptcy court was required to look at the true nature of the charge at issue, in this case, the bankruptcy court correctly allowed the PBGC's claims based upon the true value of those claims rather than the artificially inflated value calculated by the PBGC.

Similarly, there has been a long line of cases that have rejected attempts by the Internal Revenue Service to impose interest rates used in the Internal Revenue Code upon debtors in bankruptcy. *See, e.g., United States v. Neal Pharmacal Co.*, 789 F.2d 1283 (8th Cir. 1986); *In re Southern States Motor Inns, Inc.*, 709 F.2d 647 (11th Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984); *In re Mansfield Tire & Rubber Co.*, 152 B.R. 477 (N.D. Ohio 1993); *In re Collins*, 184 B.R. 151 (Bankr. N.D. Fla. 1995); *In re Trevarrow Lanes, Inc.*, 183 B.R. 475 (Bankr. E.D. Mich. 1995). Although those interest rates are appropriate for purposes outside of bankruptcy, they are not appropriate for purposes of bankruptcy because they do not provide the Internal Revenue Service "the present value of its claim as required under 11 U.S.C. § 1129(a)(9)(C) (1982). . . . " *United States v. Neal Pharmacal Co.*, 789 F.2d 1283 (8th Cir. 1986).

The PBGC has suggested that the decision of the court of appeals in this case is inconsistent with this Court's decision in *Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15 (2000). *Raleigh* dealt with the placement of the burden of proof on a state tax claim. There is nothing in the court of appeals decision in this case that is in any way inconsistent with this Court's opinion in *Raleigh*.

Refusal to follow the state law's placement of the burden of proof in *Raleigh* would have resulted in total disallowance of the claim at issue in that case. In this case, however, the PBGC's claims were allowed for their true value. Refusal to follow the regulation drafted by the PBGC for a purpose other than accurately valuing its unfunded benefit liabilities did not result in the complete disallowance of its claims.

Further, *Raleigh* did not involve a conflict between state law and bankruptcy law. There was no provision of the Bankruptcy Code that placed the burden of proof differently than it was placed by state law. As noted by this Court:

> Creditors' entitlements in bankruptcy arise in the first instance from the underlying substantive law creating the debtor's obligation, subject to any qualifying or contrary provisions of the Bankruptcy Code.

Raleigh, 530 U.S. at 20 (citations omitted). In this case, there is a "qualifying or contrary" provision of the Bankruptcy Code. Section 502(b) of the Bankruptcy Code, 11 U.S.C.A. § 502(b), specifically provides that, once there has been an objection to a claim, the bankruptcy court is to determine "the amount of such claim in lawful currency of the United States." To permit the PBGC, by its regulation, to dictate to the bankruptcy court the amount of its claim would be a violation of Section 502(b). It would also be a violation of the concept of equality embodied in Section 1123(a)(4) of the Bankruptcy Code, 11 U.S.C.A. § 1123(a)(4):

> (a) Notwithstanding any otherwise applicable non-bankruptcy law, a plan shall –

. . . .

> (4) provide the same treatment for each claim or interest of a particular class. . . .

The PBGC has argued that the equality provision of Section 1123(a)(4) does not come into play until after a claim has "been determined and allowed by the bankruptcy court." Pet. 20. According to it, the bankruptcy court was required to allow its claims at the inflated amounts dictated by the PBGC's regulation, and then treat those inflated claims equally with other creditors' claims that had been allowed at their true values. The distinction argued for by the PBGC is a distinction without a difference. As discussed above, acceptance of the PBGC's argument would have meant that it would have recovered 93.56% of the remaining net distributable estate instead of the 4.6% of the remaining net distributable estate to which the true value of its claims entitle it. The process argued for by the PBGC is as violative of the principle of equality as would be a process that allowed the PBGC's claims in their true amount and then paid those claims at more than their face value while paying the claims of other creditors in the same class at less than their face value. The decision of the court of appeals in this case was consistent with bankruptcy law and consistent with this Court's decision in *Raleigh*. The United States Court of Appeals for the Sixth Circuit correctly determined the discount rate to be used in allowing the PBGC's unfunded benefit claims, and there is no compelling reason to grant certiorari in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOSEPH F. HUTCHINSON, JR.*
CLAIR E. DICKINSON
BROUSE MCDOWELL
Attorneys for Respondent
500 First National Tower
Akron, OH 44308
(330) 535-5711

**Counsel of Record*
June 29, 2001

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IN THE

Supreme Court of the United States

PENSION BENEFIT GUARANTY CORPORATION,
Petitioner,

v.

KATHRYN A. BELFANCE, Trustee,
the Copperweld Steel Company Liquidation Trust,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONER

JAMES J. KEIGHTLEY *
General Counsel
WILLIAM G. BEYER
Deputy General Counsel
ISRAEL GOLDOWITZ
SUSAN E. BIRENBAUM
Assistant General Counsels
KENNETH J. COOPER
NATHANIEL RAYLE
GARTH D. WILSON
Attorneys
PENSION BENEFIT GUARANTY CORPORATION
1200 K Street, N.W.
Washington, D.C. 20005
(202) 326-4020

Of Counsel:
CHARLES G. COLE
STEPTOE & JOHNSON, L.L.P.
1330 Connecticut Ave., N.W.
Washington, D.C. 20036-1795
(202) 429-3000

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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I. THE OPPOSITION UNDERSCORES THE NEED FOR THIS COURT TO REVIEW THE COURT OF APPEALS' RULING THAT BANKRUPTCY COURTS MAY IGNORE A REGULATION ADOPTED PURSUANT TO AN EXPRESS CONGRESSIONAL DELEGATION

The brief in opposition illustrates the erroneous reasoning that has led lower courts to ignore an express Congressional direction when determining a pension plan's unfunded benefit liabilities. ERISA defines the unfunded benefit liabilities of a terminated pension plan as the difference between the value of the plan's assets and the value of its benefit liabilities. The statute then specifically directs that the "value of the benefit liabilities under the plan" be determined "on the basis of assumptions prescribed by the corporation [PBGC] . . . ." 29 U.S.C. § 1301(a)(18). Respondent repeatedly argues, however, that a bankruptcy judge is entitled to ignore this explicit direction, and instead determine what Respondent calls the "true economic value" of PBGC's claim. But Congress has already directed how the value of a pension plan's unfunded benefit liabilities is to be measured, and PBGC adopted a regulation to implement Congress's instruction in full compliance with the Administrative Procedure Act. The regulation has never been challenged as arbitrary and capricious in the twenty years since it was originally promulgated.

The brief in opposition does not challenge the validity of the regulation, but rather attacks the institutional competence of PBGC to promulgate regulations that would be effective in bankruptcy. According to Respondent, PBGC "does not claim that it has special expertise that allows it to more accurately reduce future benefits to their present value." Opp. 24. Congress, however, has explicitly recognized PBGC's expertise, and authorized it to prescribe assumptions for measuring unfunded benefit liabilities. Bankruptcy courts

have no power to substitute their judgments for those of the agency to whom Congress has assigned that responsibility. *See Batterton v. Francis*, 432 U.S. 416, 425 (1977).

Respondent's approach, like the decision below, allows bankruptcy courts to usurp both Congress's legislative direction and an agency's implementation of that direction pursuant to an express delegation. It invites bankruptcy courts, based on their own policy assessments, to make *de novo* adjudications of the methodology to be used in determining a pension plan's unfunded benefit liabilities. For example, Respondent asserts that a bankruptcy court should decline to follow the regulatory methodology if it finds that the "purpose" behind the regulation would not be furthered in a bankruptcy context. Opp. 21. The regulation, however, is a uniform rule, and there is no basis in either administrative law or the Bankruptcy Code for a court to evaluate the rule on a case-by-case basis.

Respondent assumes that by applying a "prudent investor rate" derived through hired experts, the bankruptcy court allowed PBGC's claims at their "true value." Respondent also assumes that because the regulatory methodology may serve to encourage the continuation of pension plans, it does not provide an appropriate measure of liability. It is undisputed, however, that the regulatory methodology produces a value that replicates the price of a comparable commodity—the cost of purchasing annuities in the marketplace. Because employers must purchase annuities to complete a standard termination of a pension plan, the regulation assures that the cost of terminating a pension plan is uniform. *See* Pet. 5. And there can be no question that measuring an employer's liability based on the price of annuities in a competitive marketplace is appropriate. "It is an old saying, 'The worth of a thing is the price it will bring.'" *Standard Oil Co. v. Southern Pac. Co.*, 268 U.S. 146, 158 (1925).

In contrast to the objective market value produced under the regulation, the "prudent investor" approach calls for determinations based on result-driven expert testimony. Moreover, the "prudent investor" approach produces a distorted value by plucking the interest assumption from a set of interdependent assumptions prescribed in the regulation and changing it in isolation. Respondent mischaracterizes the regulatory methodology as a "three-step process" by which PBGC calculates a pension plan's unfunded benefit liabilities by first calculating benefits using "assumptions regarding such things as expected retirement ages and life expectancy," and then separately reducing those benefits "to their present value . . . by applying interest factors."[1] Opp. 7-8. In fact, the regulatory methodology replicates the price of annuities only through the *combined* application of the prescribed interest and mortality assumptions.[2] The interest factor is not a free-standing feature that can be replaced with a rate borrowed from some other context.

Despite Congress's express delegation, Respondent contends that a bankruptcy court may rewrite the regulation as it sees fit. Respondent's argument rests on language in section 502(b) of the Bankruptcy Code that directs a bankruptcy court to "determine the amount of [a] claim in lawful currency of the United States." 11 U.S.C. § 502(b); Opp. 26. But nothing in that language suggests that a bankruptcy court

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[1] Respondent repeatedly mischaracterizes PBGC's claim for unfunded benefit liabilities as a stream of future liabilities that must be reduced to present value. It is not. ERISA defines an employer's liability to PBGC as a single amount—"the total amount of the unfunded benefit liabilities (as of the termination date)." 29 U.S.C. § 1362(b)(1)(A).

[2] The interest factor is derived by starting with a survey of annuity prices, and then choosing an "interest rate (or rates) which when *combined* with the PBGC mortality table would accurately replicate the price structure reflected in single-premium, nonparticipating group annuity contract prices from the survey." 58 Fed. Reg. 5128 (1993) (emphasis added).

may set aside the substantive law under which a claim arises.[3] In fact, as this Court held in *Raleigh v. Illinois Dep't of Revenue*, 530 U.S. 15, 20 (2000), "the 'basic federal rule' in bankruptcy is that [nonbankruptcy] law governs the substance of claims." By no stretch is section 502(b) a "qualifying or contrary" provision of the Bankruptcy Code that, under *Raleigh*, empowers a bankruptcy court to override the substantive law. Opp. 26. And Respondent does not even attempt to justify the court of appeals' cramped reading of *Raleigh*, by which it artificially distinguished the amount of a claim from its validity.

Curiously, Respondent relies on cases that did not involve the determination of claims under section 502(b). *United States v. Reorganized CF&I Fabricators*, 518 U.S. 213 (1996), dealt with whether a claim would receive tax priority under section 507 of the Bankruptcy Code, thus entitling it to be paid ahead of general unsecured claims. In other words, the case concerned what *Raleigh* called the "ordering" of claims for distribution purposes. 530 U.S. at 23-24. In *Reorganized CF&I*, the Court concluded that an exaction labeled a tax under the Internal Revenue Code is not necessarily a tax for purposes of the priority provisions of the Bankruptcy Code. 518 U.S. 213. Clearly, priority status is an issue of bankruptcy law, but there is no authority for a bankruptcy court to disregard the substantive law when determining claims under section 502(b). *See Raleigh*, 530 U.S. at 23-24.

The Internal Revenue Service cases cited on page 25 of the brief in opposition involve plan confirmation, an entirely different stage of a bankruptcy proceeding. Specifically, the cases involve section 1129(a)(9)(C) of the Bankruptcy Code,

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[3] A bankruptcy court typically applies the quoted language in a straightforward manner, such as by converting claims denominated in foreign currency into U.S. dollars. *See Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 250 (2d Cir. 1999).

which requires that a plan of reorganization provide for deferred payments having a "value," as of the confirmation date, equal to the allowed amount of tax priority claims. These cases do not deal with the determination of claims, but with the valuation of a debtor's delayed payment of tax claims that have already been allowed.

Respondent also cites *Associates Commercial Corp. v. Rash*, 520 U.S. 953 (1997), to emphasize that the Bankruptcy Code often reshapes debtor and creditor rights. Opp. 24. While this statement may be true on a general level, *Rash* does not support the proposition that a bankruptcy court may set aside the substantive law when determining claims under section 502(b). In *Rash*, there was no dispute over the amount of the creditor's claim as determined under state law. Rather, the case dealt with what portion of that claim would receive secured status under section 506(a) of the Bankruptcy Code. Accordingly, the Court's holding focused on the narrow issue of how collateral is to be valued for purposes of determining what portion of a creditor's allowed claim will be treated as a secured claim.[4]

Finally, like the court below, Respondent relies on section 1123(a)(4) of the Bankruptcy Code, and the policy of equality of distribution. Respondent does not dispute PBGC's point that section 1123(a)(4) governs only distributions on claims that have already been determined. Rather, Respondent repeatedly asserts that the regulatory methodology produces an amount that exceeds the "true value" of PBGC's claim, and contends that if PBGC's claim is determined under the regulation, PBGC would be entitled to a disproportionate

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[4] The decision in *Rash* turned on specific language in section 506(a) of the Bankruptcy Code, which states that an "allowed claim secured by a lien on property . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property" and explicitly directs that "[s]uch value shall be determined in light . . . of the proposed disposition or use of such property." 11 U.S.C. § 506(a).

amount of the remaining distributable estate in this case. Opp. 18, 27. But this does not constitute "special treatment in bankruptcy, different from the treatment afforded other creditors." Opp. 15. When claims are properly determined in accordance with the relevant nonbankruptcy law, and paid on a pro-rata basis, the principle of equality is served despite the fact that the claims differ in size.

Respondent's arguments about equality highlight the faulty reasoning that lower courts have applied when determining PBGC's unfunded benefit liabilities claims. Despite this Court's decision in *Raleigh*, courts continue to impose their own policy views to displace PBGC's regulation and determine PBGC's claim accordingly. PBGC has faced this hostility from bankruptcy courts, and acquiescence by appellate courts, for more than a decade. This Court's intervention is necessary to end this erroneous line of decisions.

II. THE OPPOSITION ILLUSTRATES THE DANGERS OF THE DOUBLE STANDARD CREATED BY THE COURT OF APPEALS' DECISION

In its petition, PBGC pointed out that the decision below creates a double standard by condoning different measures of a pension plan's unfunded benefit liabilities, depending upon whether an employer is in bankruptcy. Respondent does not dispute this. In fact, Respondent endorses this double standard, asserting that the purpose of the regulation is appropriate outside bankruptcy, but not in bankruptcy. Opp. 20. Respondent ignores the need for uniform administration of Title IV of ERISA, preferring to allow bankruptcy courts to make their own regulatory policies. And Respondent also ignores the anomalous results produced by the double standard, like controlled group members being jointly and severally liable for different amounts depending on whether they are in bankruptcy.

Moreover, the brief in opposition underscores the perverse economic incentives that the double standard generates. Respondent points out that other creditors in this case will receive 95% of the remaining net distributable estate, as compared to 6% if the bankruptcy court had determined PBGC's claim under the regulatory methodology. Opp. 27. Such dramatic swings could influence creditors in future cases to pressure a company to terminate underfunded pension plans in bankruptcy.

Respondent attempts to dismiss these concerns, based largely on the assertion that neither the debtors in this case, nor any decision-makers of the debtors, stand to gain anything from the slashing of PBGC's unfunded benefit liabilities claim. Opp. 22. But when companies are in financial distress, management will typically choose a course of action that benefits those who have a continuing relationship with the company, including lenders and suppliers. This is true whether a company is attempting to reorganize or to sell its assets as a going concern. An involuntary governmental creditor like PBGC is therefore an ideal source of "financing" for a reorganization or other restructuring through bankruptcy. Indeed, in the first LTV bankruptcy, it was "undisputed that one of LTV Corp.'s principal goals in filing the Chapter 11 petitions was the restructuring of LTV Steel's pension obligations, a goal which could be accomplished if the Plans were terminated and responsibility for the unfunded liabilities was placed on the PBGC." *PBGC v. LTV Corp.*, 496 U.S. 633, 640 (1990).

The lack of a uniform standard also creates uncertainty and inefficiency, as a bankruptcy court's determination of PBGC's claim in a particular case will depend upon its evaluation of testimony given by actuaries, economists, and other expert witnesses. This is exactly what Congress sought to avoid when it directed PBGC to prescribe uniform assumptions. Respondent dismisses this concern, largely

because the parties entered into a stipulation that eliminated the need for a trial in this case. Opp. 19. But PBGC stipulated in this case solely because it was trying to frame a clean legal issue to expedite a decision and appeal. Before the stipulation was reached, both PBGC and Respondent retained experts and engaged in lengthy discovery. And in the preceding cases involving PBGC's unfunded benefit liabilities claim, both PBGC and the opposing parties used expert witnesses, and the courts conducted trials.

Respondent argues that the potential for litigation in the many bankruptcy cases in which PBGC is involved means that this Court need not grant immediate review. But Respondent does not address the constraints that prevent PBGC from litigating most bankruptcy cases to a final appeal. A battle of experts followed by multiple levels of appeal is an expensive and extraordinarily time-consuming process. At the same time, uncertainty over PBGC's claims can prevent formulation and confirmation of a plan of reorganization, or the distribution of estate proceeds in a liquidation. This leads to intense pressure for PBGC to settle its claims. Indeed, the six years of litigation in this case and the seven-year saga in the *CF&I* bankruptcy demonstrate why bankruptcy constituencies—the debtor, financial and trade creditors, employees, communities—press for a negotiated resolution. And Respondent ignores the fact that debtors, not PBGC, control the circuit in which a bankruptcy petition is filed. As noted in PBGC's petition, several large steel companies with underfunded pension plans and operations in several states have recently filed bankruptcy petitions in Ohio, where the decision below is controlling law. Pet. 24.

Respondent makes much of the $9.7 billion surplus recorded in PBGC's single-employer insurance program during fiscal year 2000, implying that this statistic proves the lack of financial impact of the decision below, and justifies the reduction of PBGC's claim from the amount prescribed

by ERISA. Opp. 17-18. One might as well suggest that the United States government's total surplus of $236 billion in fiscal year 2000 [5] warrants the judicial slicing and dicing of all federal claims. On the contrary, the amount on hand at any given moment is not, by itself, a reliable indicator of whether an insurance fund will be able to pay the claims against it in the future. PBGC's exposure is subject to wide annual swings. Claims are sensitive to changes in interest rates and stock returns, overall economic conditions, the performance of particular industries, and the bankruptcies of a few large companies. As of December 31, 1999, PBGC's estimated "reasonably possible" exposure was $5 billion,[6] and it had ranged as high as $22 billion as recently as September 30, 1996. 2000 PBGC Ann. Rep. 17-18; 1996 PBGC Ann. Rep. 10. Another measure of exposure is the total deficit in underfunded plans insured by the PBGC. In 1997, the most recent year for which data are available, total underfunding in PBGC-insured plans stood at $48 billion, having reached $83 billion only a year before. PBGC, *Pension Insurance Data Book 1999* 40 (tab. S-24) (2000). Consistent with GAO's overall findings in 1998,[7] PBGC concluded in March 2001:

> Large claims from a small number of terminations and volatility characterize the agency's historical experience . . . .
>
> . . . No single underfunding number or range of numbers . . . is sufficient to evaluate PBGC's exposure

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[5] Executive Office of the President, *Budget of the United States Government: Analytical Perspectives, Fiscal Year 2002* 325 (tab. 17-3) (2001).

[6] PBGC classifies the underfunding for plans of financially weak companies (i.e., with below-investment-grade bond ratings) as "reasonably possible" exposure for purposes of its financial statements, consistent with generally accepted accounting principles.

[7] Pet. 23 (quoting GAO, Pension Benefit Guaranty Corporation: Financial Condition Improving, but Long-Term Risks Remain 23 (1998)).

> and expected claims over the next ten years. There is too much uncertainty about the future, both with respect to the performance of the economy and the performance of the companies that sponsor insured pension plans.

2000 PBGC Ann. Rep. 18.

Because most terminations of underfunded pension plans occur in a bankruptcy context, the approach adopted by the court below renders the ERISA regulatory scheme meaningless in the arena where it is most needed. As Respondent's arguments in favor of a double standard illustrate, the bankruptcy community is quite comfortable with creating its own rules and relegating the regulatory scheme to the nonbankruptcy context. Immediate review by this Court is necessary to halt this dangerous trend.

Respectfully submitted,

JAMES J. KEIGHTLEY *
General Counsel
WILLIAM G. BEYER
Deputy General Counsel
ISRAEL GOLDOWITZ
SUSAN E. BIRENBAUM
Assistant General Counsels
KENNETH J. COOPER
NATHANIEL RAYLE
GARTH D. WILSON
Attorneys
PENSION BENEFIT GUARANTY CORPORATION
1200 K Street, N.W.
Washington, D.C. 20005
(202) 326-4020

Of Counsel:
CHARLES G. COLE
STEPTOE & JOHNSON, L.L.P.
1330 Connecticut Ave., N.W.
Washington, D.C. 20036-1795
(202) 429-3000

* Counsel of Record